FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 8, Original.

8 Orig'l.
O. T. 1906

EX PARTE: IN THE MATTER OF GEORGE MORAN, PETITIONER.

DEMURRER TO RETURN OF RESPONDENT.

Comes now petitioner herein, George Moran, by his attorneys, Finis E. Riddle and William I. Cruce, and files this his demurrer to the return of the respondent herein, W. H. Haskell, to the petition filed herein and the rule issued thereon on the 16th day of April, A. D. 1906, and for such demurrer states:

That said return is insufficient in law and fails to show any legal reason why the petitioner's prayer should not be granted.

Wherefore your petitioner prays the judgment of the court, and will ever pray.

FINIS E. RIDDLE,
WM. I. CRUCE,
Counsel for Petitioner.

[Endorsed:] Supreme Court of the United States. October term, 1905. No. 22, original. *Ex parte:* In the matter of George Moran, petitioner. Demurrer to respondent's return. Filed May 19, 1906.

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FILED
JUL 26 1906
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 8, Original.

EX PARTE: IN THE MATTER OF GEORGE MORAN, PETITIONER.

BRIEF FOR THE PETITIONER.

FINIS E. RIDDLE,
WILLIAM I. CRUCE,
Counsel for Petitioner.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 22503

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 8, Original.

EX PARTE: IN THE MATTER OF GEORGE MORAN, PETITIONER.

PETITION FOR WRIT OF HABEAS CORPUS AND CERTIORARI.

BRIEF IN BEHALF OF PETITIONER.

On the 16th day of April, A. D. 1906, leave was granted to the petitioner, George Moran, by this honorable court to file his petition as an original proceeding for writ of *habeas corpus* and writ of certiorari to the United States circuit court of appeals for the eighth circuit, and a rule was issued thereon by this court to the warden of the Kansas State penitentiary at Lansing, Kansas, directing him to show cause within thirty days before this court why the prayer of the petitioner should not be granted.

W. H. Haskell, warden of the penitentiary, made his return to the rule and the petition on the 15th day of May, A. D. 1906, setting up therein cause for the detention of the petitioner a certified copy of the indictment and the judgment of the district court within and for Comanche county thereon, as shown by the exhibit to the petition, and also a certified copy

of the contract entered into between the Oklahoma authorities and the warden of the penitentiary.

To this return the petitioner filed his demurrer on the 19th day of May, A. D. 1906, and the matter is now before the court for final hearing upon the petition, the return thereto and the demurrer to said return.

STATEMENT OF FACTS.

The petitioner alleges in substance as grounds for release and why the judgment of the court is void and his imprisonment illegal:

First. That at the time the pretended indictment was returned by the grand jury the court was not organized as required by the act of Congress creating it, as set out specifically in the petition, and therefore it had no authority to organize the grand jury or to try said petitioner.

Second. That the pretended court failed to acquire any jurisdiction over said petitioner for want of a valid indictment, and that the paper returned as an indictment was absolutely void; and the reasons alleged for the invalidity of said indictment in substance are: that the court wholly and purposely disregarded the laws of the Territory of Oklahoma relative to the drawing, selection, and organizing of a grand jury, and that the common law and the laws of the United States were likewise non-observed, in this: that the court issued an open venire, and the names were not drawn as required by law, etc.; that none of said persons composing said pretended grand jury *were qualified electors* under the law of the Territory, and none of them were qualified grand jurors under the law, and many of them were *non-residents* of the county and Territory, and one of said persons composing said grand jury was bodily and mentally disqualified by reason of being addicted to opiates; that the officer directed to sum-

mon said persons composing said pretended grand jury was prejudiced against the petitioner and purposely selected the persons composing said pretended grand jury within and about the city of Lawton among and out of transient persons about thirty-five miles from where said alleged crime was committed. He alleges that he was not present and had no opportunity to object to the procedure in the selection, empaneling, and organizing of said pretended grand jury, but at the first opportunity he filed his motion in accordance with the statutes of Oklahoma, praying that the court quash and set aside said indictment, as shown by the copy of said motion attached to the petition, and alleges that the facts in said motion were at said time and are now true. He further alleges that the court, without any discretion and in contravention of a plain statute, arbitrarily overruled said motion and thereby exceeded its jurisdiction, and, for the reasons alleged, the judgment is void. He further alleges that he has exhausted all remedies open to him in the ordinary modes without avail, and that he comes to this court in this proceeding as his only remedy for relief.

Third. He challenges the judgment of the court on another ground and alleges the court was without jurisdiction for the reason the particular portion of the country where said alleged crime was committed was not embraced in any organized county at the date of the commission of said crime, and that said unorganized portion of said Territory was under the jurisdiction of Canadian county for judicial purposes by virtue of an order of the Supreme Court attaching said country to Canadian county for judicial purposes under the act known as "The Organic Act of Oklahoma," and therefore the venue of said alleged crime was in Canadian county and not in Comanche county. A copy of the order of the Supreme Court, as aforesaid, is attached to the petition as Exhibit "F."

Fourth. He alleges as another reason for the invalidity of said judgment under which he is imprisoned that that por-

tion of the Territory wherein said alleged crime was committed and on the date of the alleged commission thereof was under the exclusive jurisdiction of the United States, and for that reason the district court sitting as a territorial court had no jurisdiction over said crime or over said petitioner.

Fifth. The last ground upon which the petitioner relies is that the court was deprived of any jurisdiction over him or over said alleged crime for the reason it invaded the petitioner's constitutional rights during the progress of said trial by compelling him to be a witness against himself, over his objections, and by misconduct of the officer in charge of the jury in permitting the jury to receive evidence outside of the court-room and in the absence of the court, and in that manner compelling said petitioner to be a witness against himself, and thereby the court lost jurisdiction over said petitioner by reason of invading his constitutional rights.

These facts, as more fully and specifically set out in the petition, are in no way denied or otherwise controlled by the record or other evidence, and stand as admitted.

The question now arises upon the admitted facts whether or not the trial court ever rightfully acquired jurisdiction over the petitioner and the alleged crime by reason of the facts alleged in the petition, or if jurisdiction was rightfully acquired whether or not the court lost its jurisdiction by reason of invading and denying the petitioner his constitutional rights and transcending a plain statute, which he contends had the effect of rendering the proceedings void.

In the outset the petitioner desires to set out a few propositions of law upon which he relies in this case.

PROPOSITIONS OF LAW RELIED UPON BY PETITIONER.

First. That the facts alleged in the petition herein, properly verified and not having been denied under oath, and which are not otherwise controlled or contradicted by the record or any evidence may be taken as true as fully as though they had been duly proven before the court.

Second. A court created by an act of the legislature only has such power and authority as given it by the act creating same, and if not organized, as prescribed by the statute, it has no power or authority to act, and its proceedings are coram non judice and void.

Third. In a habeas corpus proceeding the court to ascertain whether the trial court has exceeded or acted beyond its jurisdiction may look to the whole record, and where the record is silent as to any other facts tending to show want of jurisdiction in the court to render the particular judgment complained of, evidence aliunde may be received; and under the laws and Constitution of the United States in cases affecting life and liberty the court may, under certain circumstances in habeas corpus proceedings, permit the record to be contradicted in order to show a want of jurisdiction in the trial court to render the particular judgment complained of.

Fourth. In a proceeding in a Federal court, or territorial court organized under the Federal Government, against a party charged with a capital or otherwise infamous crime a valid and legal indictment, presented by a grand jury, is a prerequisite to give the court jurisdiction over the person of the defendant.

FIFTH. THE COURTS IN THE TERRITORY OF OKLAHOMA CAN NO MORE DISREGARD THE PLAIN PROVISIONS OF THE STATUTE IN THE SELECTION AND EMPANELING OF A GRAND JURY IN A CAPITAL CASE, MADE FOR THE PROTECTION OF A DEFENDANT, AND BY THAT MEANS DEPRIVE HIM OF HIS FUNDAMENTAL AND CONSTITUTIONAL RIGHTS, THAN CAN THE LEGISLATURE OF SAID TERRITORY DEPRIVE HIM OF SUCH RIGHTS BY ENACTING A LAW WHICH IS IN CONFLICT WITH ANY PROVISION OF THE CONSTITUTION.

SIXTH. THE CIRCUIT COURT OF APPEALS ERRED WHEREIN IT HELD, IN EFFECT, IN THIS CASE, THAT THE TERRITORIAL GOVERNMENT AND THE TERRITORIAL COURTS OF THE TERRITORY OF OKLAHOMA STAND IN THE SAME RELATION TO THE FEDERAL GOVERNMENT AS STATE GOVERNMENTS AND STATE COURTS, AND IN HOLDING THAT THE FEDERAL COURT HAS NO AUTHORITY OR POWER TO RELEASE THE PETITIONER BY WRIT OF HABEAS CORPUS, ALTHOUGH THE FACTS SHOW THE TERRITORIAL TRIAL COURT EXCEEDED ITS JURISDICTION.

SEVENTH. WHERE THE LOCAL LEGISLATURE HAS ENACTED A LAW GOVERNING THE COURTS IN THE SELECTION, SUMMONING, EMPANELING, AND ORGANIZING OF A GRAND JURY, WHICH LAW IS INCONSISTENT WITH THE COMMON LAW, SUCH MODE IS EXCLUSIVE AND MUST BE FOLLOWED. IT IS ONLY WHEN THE LOCAL STATUTE HAS MADE NO PROVISION IN SUCH CASES OR THE STATUTE HAS FIRST BEEN EXHAUSTED THAT THE COURT CAN RESORT TO THE COMMON-LAW METHOD OF SECURING A GRAND JURY, AND THEN THE JURORS MUST BE QUALIFIED UNDER THE STATUTE.

EIGHTH. IN ORDER TO CONSTITUTE A LEGAL AND VALID INDICTMENT THE PLAIN PROVISIONS OF THE STATUTE RELATIVE TO THE SELECTION, SUMMONING, AND EMPANELING OF A GRAND JURY MUST BE SUBSTANTIALLY COMPLIED WITH, AND IF THE COURT WHOLLY DISREGARDS THE STATUTE IN ANY MA-

TERIAL MATTER THE BODY CALLED A GRAND JURY IS NOT A LEGAL GRAND JURY, AND PRETENDED INDICTMENT FOUND AND RETURNED BY IT IS ABSOLUTELY VOID.

NINTH. THE LAW IN THE TERRITORY OF OKLAHOMA RELATIVE TO THE SELECTION, SUMMONING, AND ORGANIZING OF A GRAND JURY IS A COMPLETE SYSTEM AND APPLIES TO THE WHOLE TERRITORY, AND IT IS SPECIFIC AND MANDATORY.

TENTH. WHERE THE TRIAL COURT HAS WHOLLY DISREGARDED THE LAW RELATIVE TO THE SUMMONING, EMPANELING, AND ORGANIZING OF A GRAND JURY, AS SHOWN BY THE RECORD IN THE CASE AT BAR, AND THE PETITIONER HAS SEASONABLY PRESENTED HIS OBJECTIONS AND HAS SOUGHT RELIEF BY THE ORDINARY MODES OPEN TO HIM UNDER THE STATUTE, WITHOUT AVAIL, THIS COURT WILL TAKE JURISDICTION AND WILL RELIEVE HIM FROM ILLEGAL IMPRISONMENT IF IN THE TRIAL RESULTING IN HIS CONVICTION AND IMPRISONMENT HE HAS BEEN DENIED FUNDAMENTAL RIGHTS GUARANTEED HIM UNDER THE CONSTITUTION.

ELEVENTH. UNDER THE ACT OF CONGRESS KNOWN AS THE ORGANIC ACT OF THE TERRITORY OF OKLAHOMA THE CONDITION OF THAT PORTION OF THE TERRITORY WHEREIN SAID ALLEGED CRIME WAS COMMITTED AT THE DATE OF THE COMMISSION THEREOF FIXED THE VENUE AND PLACE OF TRIAL, INSTEAD OF THE CONDITION OF THAT PORTION OF SAID TERRITORY AT THE DATE OF FINAL TRIAL.

TWELFTH. ANY CRIME COMMITTED ON ANY INDIAN RESERVATION, OR IN ANY COUNTRY OR ON ANY LANDS UNDER THE EXCLUSIVE JURISDICTION OF THE UNITED STATES, IS A CRIME AGAINST THE FEDERAL GOVERNMENT AND IT HAS EXCLUSIVE AND ONLY JURISDICTION TO PROSECUTE AND PUNISH THE OFFENDER FOR THE COMMISSION THEREOF.

THIRTEENTH. THE PETITIONER HAVING BEEN COMPELLED, OVER HIS OBJECTION, TO EXHIBIT HIMSELF BEFORE THE JURY AND WALK IN THE PRESENCE OF THE JURY WHILE STATIONED OUTSIDE OF THE COURT-ROOM AND OUT OF THE PRESENCE OF THE COURT, FOR THE PURPOSE OF THE JURY OBSERVING HIS PECULIAR WALK, SIZE, AND GENERAL APPEARANCE, WAS THEREBY FORCED AND COMPELLED TO BE A WITNESS AGAINST HIMSELF WITHIN THE PURVIEW OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

FOURTEENTH. THE FEDERAL COURT WILL INTERFERE IN THE ADMINISTRATION OF A TERRITORIAL COURT, AND EVEN A STATE COURT, IN HABEAS CORPUS PROCEEDINGS WHEN SAID COURT, IN THE ADMINISTRATION OF THE LAW OF SAID TERRITORY OR STATE, DISREGARDS AND DENIES A CITIZEN HIS FUNDAMENTAL AND CONSTITUTIONAL RIGHTS, ESPECIALLY IF SAID CITIZEN HAS EXHAUSTED THE ORDINARY MODES OF REVIEW BY APPEAL OR WRIT OF ERROR.

We desire first to briefly call the attention of the court to the propositions asserted herein and to the power of the court in *habeas corpus* proceedings from a negative standpoint, as we understand the law.

We appreciate the well-settled doctrine as laid down by this court that the writ of *habeas corpus* will not be used and made to serve the purpose of an appeal or writ of error; but, with a few exceptional and urgent cases, will only be issued when the judgment under which the petitioner is detained is absolutely void; however, it has been held in a few exceptional cases where the error is apparent that it will be issued to save the expense and delay by the ordinary modes of procedure.

See *In re* Chapman, 156 U. S., 218; Storti *vs.* Massachusetts, 193 U. S., 142.

We further appreciate the fact that this court will not ordinarily interfere with the proceedings of the State courts in

the application, construction, and administration of the State laws by writ of *habeas corpus,* except in cases where it is plainly shown that the State courts have denied a citizen those fundamental rights guaranteed under the Constitution, and that in the excepted cases this court will not grant the writ of *habeas corpus* until the party has exhausted his remedies in the ordinary modes provided by the State law for appeal or writ of error, and as provided by the act of Congress for an appeal or writ of error to this court.

We are also aware that the fifth and sixth amendments to the Constitution do not apply and are no inhibition upon the States and State courts, but we insist they do apply to the Territories.

We, too, realize the fact that the court will not ordinarily after conviction issue the writ of *habeas corpus* for mere irregularities or errors committed by the court in empaneling the grand jury which found the indictment, but in cases where the court has disregarded the whole law in the selection and empaneling of the grand jury and permits persons wholly incompetent and disqualified under the law to become members of that body, then in such cases the whole proceedings are void and their finding and presentment is insufficient to give the court jurisdiction, and the writ will issue.

While we are fairly familiar with these different rules, as laid down by this court, yet we do contend that, in cases where the court overrides a plain statute and invades the petitioner's constitutional rights and commits such error as renders the judgment void, this court will not refuse to take jurisdiction and issue the writ of *habeas corpus* and release the prisoner merely for the reason the trial court committed an error. Every void judgment is an erroneous judgment by reason of errors committed by the trial court, while every erroneous judgment or every error committed by the trial court does not make or constitute a judgment void, and we contend in the present case that for the several grounds set out in the petition and admitted to be true the court failed to acquire

jurisdiction over the person of the petitioner, and if it ever rightfully had jurisdiction over him it lost such jurisdiction by overriding and disregarding the plain provision of the statute and in invading his constitutional rights.

ARGUMENT AND AUTHORITIES IN SUPPORT OF FIRST PROPOSITION.

These facts, having been alleged in detail in the petition and not in any way denied or contradicted by the return of the warden and not otherwise controlled by the record or evidence, we take it, will be taken as though duly proven. It was so held in the case of Kohl *vs.* Lehlback, reported in 160 U. S., p. 291, opinion rendered by Chief Justice Fuller, and also in the case of Whitten *vs.* Tomlison, 160 U. S., p. 231. This court in these cases used the following language:

"On a petition for writ of *habeas corpus,* verified by the oath of the petitioner, as required by the U. S. Revised Statutes, section 754, facts duly alleged may be taken to be true unless denied by the return or controlled by other evidence."

ARGUMENT AND AUTHORITIES CITED UNDER SECOND PROPOSITION.

WAS THE DISTRICT COURT THAT CAUSED THE INDICTMENT AND TRIAL OF THE PETITIONER ORGANIZED AS REQUIRED BY THE ACT OF CONGRESS CREATING IT?

Referring to section 9 of the act of Congress, section 69, page 75, of Wilson's Annotated Statutes of Oklahoma, it is provided:

"The Supreme Court shall define said judicial districts and shall fix the times *and places* at each county seat in each district where the district court shall be held, and designate the judge who shall preside therein."

And again under a later act of Congress providing for the appointment of additional judges for the Territory of Oklahoma, approved August 8, 1894, it is provided:

"The said Territory shall be divided into five judicial districts and a district court shall be held in each county, as now provided by law. The Supreme Court of said Territory shall define said judicial districts and shall fix the times *and places* at each county seat in each district where the district court shall be held, and designate the judge who shall preside therein."

It will be seen by these provisions that in order for a district court to be properly organized, with power to try cases as a court, there were four things to be done by the Supreme Court. The first was to define the judicial district; second, to designate the time when the court should be held; third, to fix the *place* at the county seat where the court should be held; and, fourth, to designate the judge who should preside therein. One seems to be just as obligatory and as specific and necessary as the other. If the Supreme Court could disregard one provision, why *could it not another* and fail to fix any time, but let the trial judge hold court at his pleasure? Also it might as well fail to designate the judge to preside in each district and let each judge go where he pleased to hold court. The law provided that a court should be held in each county; the law provided that a court should be held at each county seat. There being no county buildings or courthouses at the time, it was necessary that some *place* be designated at the county seat for the court to be held. This the law said should be *fixed by the Supreme Court.*

The Congress of the United States, in order that there might be some uniformity and some definite and permanent place of holding court, saw proper to place the duty of fixing the *places* at the county seat of holding court upon the Supreme Court of the Territory. That being true, can said court, by failing and refusing to fix the place, leave it for the

district judge, and in that manner organize a court with authority to transact the business of a court?

We think it unnecessary to cite but little authority on the proposition that a court created by the legislature can only be organized in the manner and as provided by the law creating it, and if it is not organized as provided by the law creating it, then it has no power or authority to try cases and to render a valid judgment.

Quoting from second edition, 8th Enc. Law, page 284:

"Both *time* and *place* are essential constituents of the organization of a court."

Hobart *vs.* Hobart, 45 Ia., 503; Columbus *vs.* Woolen Mills Co., 30 Ind., 436; Greenwood *vs.* Bradford, 128 Mass., 296; King *vs.* King, 1 P. M. W., 19.

"The *place* is an important element of the court."

In re Allison, 13 Colo., 535; American St. Rep., 224.

In 21st vol., Enc. Pleading and Practice, page 608, the rule is laid down as follows:

"Where the power is delegated to the *Supreme Court* to fix the time and *place* of holding court such power cannot be exercised by a *single district judge* in his district."

Northrup *vs.* People, 37 N. Y., 203.

"Accordingly, when it is attempted to hold a term or session at a time and place different from those prescribed all acts done thereat, other than those properly done in vacation, are as a general rule absolutely void."

Ex parte Cranch, 63 Ala., 283; Boynton *vs.* Wilson, 46 Ala., 510; Garland *vs.* Dunn, 63 Ala., 404; Wrightnor *vs.* Carsner, 20 Ala., 446; Napper *vs.* Nolan, 9 Port (Ala.), 218; Nabor *vs.* State, 6 Ala., 200; Neal *vs.* Shinn, 49 Ark., 227; State *vs.* Williams, 48 Ark., 225; Grimet *vs.* Askew, 48 Ark., 151; Chapman *vs.* Holmes, 47 Ark., 414; Hamm *vs.* State, 22 Ark., 207; Brumley *vs.* State, 20 Ark.,

77; *Ex parte* Jones, 27 Ark., 349; *Ex parte* Osborn, 24 Ark., 379; Dunn *vs.* State, 2 Ark., 229; Bates *vs.* Gage, 40 Cal., 183; Clellan *vs.* People, 4 Colo., 244; American Fire Ins. Co. *vs.* Pappe, 4 Okla., 110; Irwin *vs.* Irwin, 2 Okla., 180.

It will be seen by referring to the record that there was no *place* designated by the Supreme Court, as required by the act of Congress, where the district court should be held. We contend that without that the court was not properly organized and was without power to organize a grand jury or a trial jury and try the petitioner.

ARGUMENT AND AUTHORITY UNDER THIRD PROPOSITION.

CAN THIS COURT GO BEHIND THE JUDGMENT AND CONVICTION OF THE TRIAL COURT AND RELEASE A PARTY IMPRISONED IN CASE THE UNCONTRADICTED RECORD SHOWS THAT HIS IMPRISONMENT IS ILLEGAL?

In the case of *Ex parte* Neilson, 131 U. S., page 182, opinion delivered by Mr. Justice Bradley, he states:

"The objection to the remedy of *habeas corpus* of course would be that there was in force a regular judgment of conviction which would not be questioned collaterally, as it would have to be done in *habeas corpus;* but there are exceptions to this rule which have more than once been acted upon by this court. It is firmly established that if the court which rendered the judgment had not jurisdiction to render it, either *because the proceedings* or the law under which they are taken are unconstitional, *or for any other reason* the judgment is void, and may be questioned collaterally and the defendant who is imprisoned under and by virtue of it may be discharged from custody in *habeas corpus.*"

Citing *Ex parte* Lang, 18 Wall., 163; *Ex parte* Seibold, 100 U. S., 371.

Quoting again from the decision, on page 183, the court uses this language:

"In other words, a constitutional *immunity* of the defendant *was violated* by the second trial and judgment. It is difficult to say whether a conviction and punishment under an unconstitutional law is *more violative* of a person's constitutional rights than an *unconstitutional* conviction and punishment under a valid law. In the first place it is true the court has no authority to take cognizance of the case at all, but in the other it has no authority to render judgment against the defendant."

And again, on page 184, it is stated:

"It was not a case of *mere error* in law, but a case of denying a person a *constitutional right*, and if we have seemed to hold to the contrary in any case it has been from inadvertence."

We contend that the doctrine announced here applies to the case at bar; that while it is a case of error, yet it is such error that renders the judgment of the court void. Every void judgment includes an erroneous judgment, but every erroneous judgment does not necessarily make the judgment void.

The same doctrine was also announced *In re* Mayfield, 144 U. S., 107-116, opinion delivered by Mr. Justice Brown. On page 116 we find this language:

"The point is taken in the brief submitted by the Attorney General that the Supreme Court has no power to consider this question upon application for writ of *habeas corpus*. This court has held, however, *in a multitude of cases* that it had power to inquire in regard to the jurisdiction of inferior courts, either in respect to the subject-matter *or the person*, even if such inquiry involves an examination of facts outside of but not inconsistent with the record."

Citing:

Ex parte Yerger, 8 Wall., 85; *Ex parte* Virginia, 100 U. S., 333; *Ex parte* Carrol, 106 U. S., 521; *Ex parte* Yarbrough, 110 U. S., 651; *Ex parte* Bigelow, 113 U. S., 328; *In re* Neilson, 131 U. S., 176; *In re* Cuddy, 131 U. S., 288; *Ex parte* Mayfield, 141 U. S., 107-116; *Ex parte* Bain, 121 U. S., 1; *In re* Swan, 150 U. S., 648.

Also see case of *In re* Nugent, 182 U. S., page ——, wherein a very elaborate opinion was handed down.

It has also been held by the district and circuit courts, under authority of *this court,* that under certain circumstances the record of the trial court may be contradicted, and the rule is laid down *In re* Elmira Steel Company, vol. 5, Amer. Bankruptcy Reports, p. 505, and cases decided by this court, cited to support same.

"The rule has long been settled that the jurisdiction of any court may be challenged in any other court where its decrees or judgments are relied on, and the record of the judgment may be contradicted as to the facts necessary to give the court jurisdiction, and if it is shown that such facts did not exist the record will be a nullity, notwithstanding it may recite that such facts did exist."

Adams *vs.* Terrell, 4 Federal Rep., 796.
Williamson *vs.* Berrn, 8 Peter (U. S.), 540.
Elliott *vs.* Piersol, 1 Peter (U. S.), 328.
U. S. *vs.* Arrondodo, 6 Peter (U. S.), 591.
Voorhees *vs.* Bank of U. S., 10 Peter, 475.
Wilcox *vs.* Jackson, 15 Peter (U. S.), 511.
Thompson *vs.* Whiteman, 18 Wall., 457.
Nooes *vs.* Gas Light & Coke Co., 19 Wall., 58.

Also to same effect see Brown on Jurisdiction, second edition, sections 101-103, pages 377-379.

ARGUMENT AND AUTHORITY CITED UNDER FOURTH, FIFTH, AND SIXTH PROPOSITIONS.

FIRST. WAS IT A PREREQUISITE TO A LEGAL CONVICTION OF THE PETITIONER THAT HE SHOULD HAVE BEEN INDICTED BY A LEGAL GRAND JURY?

SECOND. IF THE LEGISLATURE OF THE TERRITORY OF OKLAHOMA WAS WITHOUT POWER TO PROVIDE BY LAW FOR THE CONVICTION OF A PERSON CHARGED WITH A CAPITAL OR OTHERWISE INFAMOUS CRIME WITHOUT A LEGAL INDICTMENT, THEN IS THE COURT NOT LIKEWISE WITHOUT POWER AND AUTHORITY TO DISREGARD THE LAWS WHICH ARE IN HARMONY WITH THE PROVISIONS OF THE CONSTITUTION, AND BY THAT MEANS DEPRIVE ONE OF ITS CITIZENS OF THOSE FUNDAMENTAL RIGHTS WHICH THE LEGISLATURE HAD NO POWER TO DO?

THIRD. DID THE CIRCUIT COURT OF APPEALS ERR IN ITS DECISION IN HOLDING IN EFFECT THAT THE LEGISLATURE OF OKLAHOMA COULD HAVE PROVIDED BY LAW FOR THE CONVICTION OF THE PETITIONER WITHOUT THE INTERVENTION AND INDICTMENT OF A GRAND JURY?

As these questions are all related, we desire to argue them together.

We contend that it is well settled that the legislature of the Territory of Oklahoma, as well as the legislature of all other organized Territories of the United States, is without power to pass a law providing for the trial, conviction and punishment of one of its citizens charged with a capital or otherwise infamous crime without the intervention and presentment of a bill of indictment by a legally constituted grand jury. If this be true, and we take it that it will be conceded, and if not conceded it will be declared to be the law by the court, then

how can the trial court or judge condemn a citizen of the Territory and sentence him for life by disregarding the laws enacted by the local legislature for its guidance, and in that manner deprive a citizen of those fundamental rights which the legislature is prohibited from doing? This, it seems, will be placing the judge and the trial court above the law and placing within the breast of each judge not only the right to legislate for his own court, but the power to suspend or repeal legislation, and that without any power lodged anywhere in the Government to interfere and correct such oppressive proceedings. This in effect is what the Circuit Court of Appeals for the Eighth Circuit held in the case at bar when this case was before it on petition for writ of *habeas corpus*. The learned judge who wrote and delivered the opinion of that court used this language:

"The statute of Oklahoma requires grand jurors to be *qualified electors* and to be *drawn from lists selected* by the *judges* of *election*. Some, if not all of those who acted as grand jurors *were not such electors*, were not *residents* or citizens of the county, and perhaps were otherwise disqualified. * * * The only provision of the Constitution which may relate in any way to the acts of the trial court here under consideration are: '(1) No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. (2) Nor be deprived of life, liberty or property without due process of law.' (Amendments to Constitution, article 5.) But the Supreme Court has decided that the trial, sentence and confinement of a person for murder in accordance with the Constitution and laws of a State without a presentment or indictment by any grand jury whatever is not a violation of either of these provisions of the Constitution."

Citing:

Harlado *vs.* California, 110 U. S., 516.
McNulty *vs.* California, 149 U. S., 645.

"The United States by the organic act of the Territory of Oklahoma empowered its legislature to enact any laws which were not in conflict with the Constitution and laws of the

United States. (1 Stat. Oklahoma, p. 73, sec. 66.) Neither the Constitution nor the laws of the United States prescribe the qualifications or the method of selection of grand jurors in the Territories, and the legislature of Oklahoma, therefore, had plenary power over these subjects."

Citing:

Clinton *vs.* Englebrecht, 13 Wall., 434-448.
Hornbuckle *vs.* Toombs, 85 U. S., 648.
Good *vs.* Martin, 96 U. S., 90-98.

"The conclusion necessarily follows that if the legislature of Oklahoma had prescribed the method of selecting grand jurors which the court adopted, and the qualifications which those who found the indictment actually possessed the course of the trial would not have constituted a violation of any provision of the Constitution of the United States, and if this be true it is difficult to perceive how this course could have constituted such a violation or more than irregularity of errors of law in the absence of such legislation."

It will be seen that that court virtually holds that the territorial legislature and the territorial courts stand in the same relation to the Federal Government as do State legislatures and State courts. It holds in effect that the Territory could, by an act of its legislature, provide for the trial, conviction and punishment of one of its citizens for murder without an indictment of a legal grand jury, or could provide by law for a grand jury of less than were necessary to make a presentment under the common law, and could provide for a conviction by a trial jury of less than twelve; and had the court proceeded in accordance with that law and the jurors had been qualified as required by such law, then it would have been no violation of the provisions of the Constitution and would have no ground for releasing on writ of *habeas corpus*. The court could have arrived at the conclusion on no other ground except that the fifth and sixth amendments to the Constitution had no application to the Territories, for the reason they did not apply to the different States. We contend

that this is in direct conflict with the decisions of this court as laid down in the case of Thompson *vs.* Utah, 170 U. S., 344, opinion of the court delivered by Mr. Justice Harlan. It was stated in the opinion, referring to the case of First National Bank *vs.* County of Kankton, 101 U. S., 129:

"It was stated that Congress in virtue of the sovereignty of the United States could not only abrogate the laws of territorial legislatures, but might itself legislate directly for the local Government. That it had full and complete legislative authority over the people of the Territories and all the departments of the territorial government; that it might do for the Territories what the people, under the Constitution of the United States might do for the States."

It will be noticed by the court, too, that the organic act of Utah is a little different from the organic act of the Territory of Oklahoma, in this: that it declares that the legislative powers of said Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of the act, while the organic act of Oklahoma Territory provides that the legislative powers shall extend to all rightful subjects of legislation *not in conflict* with the Constitution of the United States and the organic act.

Again the court stated:

"If one on trial for a felony, the punishment of which is confinement in the penitentiary cannot legally consent that the trial proceed in his absence, still less can he assent to be deprived of his liberty by a tribunal not authorized by law to determine his guilt. In our opinion the provision of the constitution of Utah providing for trial in courts of general jurisdiction of criminal cases by a jury composed of eight persons is *ex post facto* to the application of felonies committed before the Territory became a State, because, in respect to such crimes the Constitution of the United States gives the accused the right to be tried by a jury of twelve persons, and he cannot be deprived of his liberty except by the unanimous verdict of such a jury."

Also to same effect we cite cases of Webster *vs.* Reed, 11 Howard, 433-460; American Publishing Company *vs.* Fischer, 160 U. S., 464; Springville *vs.* Thomas, 166 U. S., 707.

We take it that it will not be contended that if the sixth amendment applies to the Territory and territorial courts the same as it does to the Federal courts that likewise the fifth amendment will apply, and that the legislature of Oklahoma was as much without power to provide by law for the trial and punishment of a person charged with a capital offense without an indictment of a legal grand jury, as provided by the fifth amendment to the Constitution and as understood and defined by the common law at the date of the adoption of that instrument, as it was to provide for the trial and punishment of a person charged with such offense by a trial jury of less or greater number than twelve, as provided by the sixth amendment to the Constitution.

It stands as an admitted fact in this case that the court not only failed to comply with the law in the matter of selecting, summoning and empaneling the grand jury, but that the court and the other officers required by law to participate in the selection, summoning and organizing of said grand jury *wholly* and *openly disregarded* the law and that none of said persons composing said grand jury were *electors* of *said Territory,* as required by law in order to be qualified jurors, and many of them were *non-residents* of said county and Territory at said time, and were each and all disqualified to sit on a grand jury in said Territory. Also it is alleged on page 5 of the record that the same facts applied to the *trial jury,* which is likewise admitted.

If the proceedings of the trial court, as admitted by the record in this case, can be upheld and it be determined that there is no power to interfere and check such proceedings, then it seems it would be well to amend the Constitution and provide that the mode of procedure, the manner of selecting jurors, and the qualifications, etc., in criminal trials should be committed to the discretion and conscience of the trial judge and that his decision should be final.

ARGUMENT AND AUTHORITIES CITED UNDER SEVENTH AND EIGHTH PROPOSITIONS.

FIRST. WAS THERE A LOCAL LAW OF THE TERRITORY IN FORCE PROVIDING FOR SELECTING, EMPANELING, AND ORGANIZING A GRAND JURY AND PRESCRIBING THE QUALIFICATIONS OF SAME, AND WAS SUCH LAW IN CONFLICT WITH THE COMMON-LAW PROCEDURE?

SECOND. WAS SUCH PROCEDURE, AS PRESCRIBED BY THE LOCAL STATUTE, EXCLUSIVE?

THIRD. THE FAILURE OF THE COURT TO SUBSTANTIALLY FOLLOW THE PROVISIONS OF THE STATUTE AND IN PURPOSELY DISREGARDING THE STATUTE IN THE MANNER OF ORGANIZING A GRAND JURY RENDERS THAT BODY AND ITS PROCEEDINGS VOID!

THE MODE OF PROCEDURE PRESCRIBED BY THE STATUTE WAS EXCLUSIVE.

As will be seen from the sections of the statute hereafter quoted under the ninth proposition, the law in reference to selecting, empaneling and organizing a grand jury was complete, and, as held by the Circuit Court of Appeals for the Eighth Circuit in the case of Sharp *vs.* United States, 138 Federal, 878, is specific and mandatory and the court had no power to disregard it.

It was held by this court in the case of Clinton *vs.* Englebrecht, 13 Wall., 434-448, that the trial court had no authority to summon a petit jury upon an open venire until the local statute had first been complied with and exhausted; that the order in such cases was unauthorized and void, and that the trial jury was likewise void and without authority to render a verdict. While we concede, and not only concede,

but insist, that the legislature of Oklahoma had plenary power to prescribe the qualifications of both grand and petit jurors, and had authority and power to prescribe the number composing the grand jury so long as it was not in conflict with the number required to find a bill under the common-law procedure, as was understood at the date of the adoption of the Constitution, we further insist that said law was exclusive and binding upon the courts and the court was without any power or authority to disregard the same, and the court had no authority to undertake or attempt to resort to the common-law method until the statute had first been complied with and the method there provided for exhausted. The court having made no attempt to comply with the statute, but openly and purposely disregarding the local statute, not only as to the mode of procedure and the manner of selecting and summoning the same, but also as to the *qualifications* of the persons attempted to be organized into the grand jury as well as the *petit jury* that tried the petitioner, we contend that for these reasons the same was an illegal body, without authority to make presentments, and that its proceedings were wholly void and insufficient to give the court jurisdiction over the petitioner.

The above propositions will also find support in the case of Crowley, plaintiff in error, *vs.* United States, on writ of error from the United States court in Porto Rico to this court, decided May 13, 1904. Mr. Justice Harlan delivered the opinion of the court. After referring to section 1025 of the Revised Statutes the court stated:

"This section can have no bearing on the present case for the disqualification of the grand jury is prescribed by statute and cannot be regarded as a mere defect or imperfection in form. It is a matter of substance and cannot be disregarded without prejudice to the accused."

The statutes of Oklahoma in reference to a grand jury repealed the common-law method.

"When the common law and the statute differ the common law gives place to the statute."

State *vs.* Norton, 23 N. J., 33.

We also find the above supported by the following decisions:

Bent *vs.* Thompson, 5 N. H., 408 (23 Pac. Rep., 234).

Browning *vs.* Browning, 2 N. Mex., 371 (9 Pac. Rep., 677).

Feitensdorfer *vs.* Webb, 1st N. Mex., 345.

McKinner *vs.* Winn, 1 Okla., 327; 33 Pac., 582; L. R. A., 501.

Utah First Nat'l Bank *vs.* Kinner, 1 Utah, 100.

People *vs.* Greene, 1 Utah, 11.

Luhr *vs.* Hancock, 811 U. S., 567.

Pyeatt *vs.* Powell, 51 Federal, 561.

"The common law is impliedly repealed by a statute which is inconsistent therewith, or which undertakes to revise and cover the whole subject-matter."

Ninth Enc. Law & Procedure, 376. Citing cases in Colorado, Delaware, Louisiana, Maine, Massachusetts, Missouri, New Hampshire, New York, Ohio, Arkansas, California, Illinois.

"Where in the statute, the performance of the act is limited to the particular form or manner it excludes every other form or manner."

Dist. Tp. City of Dubuque *vs.* City of Dubuque, 7 Ia., 262.

"Where the statute to attain a particular object prescribed the mode to enforce it, such mode must be pursued."

In re Hughes, 1st Bland, 46.

"Criminal statutes cannot be extended to cases not included within the clear and obvious import of their language."

U. S. *vs.* Clayton, Federal case 14814.

Also case of Territory *vs.* Carmody, 45 Pac., 881.

In McGann *vs.* Hamilton (Conn.), 19 Atl., 376, it was held that where a statute provides the manner of selecting a jury all other ways are *impliedly prohibited.*

It was held in the case of Bannigan *vs.* State, 24 Pac., 768:

"In the face of the statute the common-law grand jury cannot be selected."

It was not a question of the inherent power of the court, because there is no court that has sufficient inherent power to authorize it to disregard the plain provisions of the law and absolutely disregard the law and act in contravention of plain statutes, and in that manner give itself jurisdiction.

ARGUMENT AND AUTHORITY UNDER EIGHTH PROPOSITION.

WAS THE INDICTMENT UNDER CONSIDERATION, AS SHOWN BY THE RECORD, IN ANY SENSE VALID AND SUFFICIENT TO GIVE THE COURT JURISDICTION?

In the case of *Ex parte In re* Bonner, on petition for writ of *habeas corpus* in this court, reported in 151 U. S., 254, Mr. Justice Fields delivering the opinion of the court, it is stated:

"We are unable to agree with the learned counsel, but are of the opinion that in all cases where life or liberty is affected by its proceedings the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and render judgment. It cannot pass beyond these limits in any essential requirement *in any stage of the proceedings.*"

And again:

"It is plain that such court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction; and when in taking custody of the accused and in its modes

of procedure in the determination of the question as to his guilt or innocence and in rendering judgment the *court keeps within the limits prescribed* by the *law*, customary or statutory. When the court *goes out* of these limits its action to the extent of the excess is void."

And again:

"If the offense be a felony the accusation in a Federal court must be made by a grand jury summoned to investigate the charge of the public prosecutor against the accused. Such indictment can only be found by a *specified number* of the grand jury. If not found by that *number* the court cannot proceed at all."

We desire now to refer to the different decisions from the Supreme Courts of the different States as to the illegality of the indictment in question.

In the case of Levy *vs.* Wilson, 60 Cal., the court used this language:

"One of the grounds stated in the petition is that the indictment was found by a body of men styled 'a grand jury.' If that be so the accusatory paper returned by them in the court below is worthless, and void, and the court had no jurisdiction to try the plaintiff upon it."

Citing People *vs.* Thurston, 5 California, 69.

Also case of Bruner *vs.* Supreme Court of San Francisco, reported in 92 Cal., 239. This case came up on an application for writ of prohibition to prohibit the trial court from trying the petitioner upon an indictment claimed to be void, for the reason a special officer was appointed by the court to summon the grand jury, not provided for by law. The court in that case stated:

"It is contended that no matter how a body of men may have been gathered together its acts cannot be attacked if it be recognized by the court as a 'grand jury,' upon the principle sometimes applied to the acts of *de facto* public officers. It would indeed be startling if a man could be put to the

partial ignominy and hazard of a trial at the will of a set of men whom the court might choose to style a grand jury. But the current doctrine on that subject was clearly stated by this court in Levy *vs.* Wilson, 60 Cal., 105; also in People *vs.* Thurston, 5 Cal., 69, the same rule was stated, where the court said: 'I regard the indictment thus found by an illegally constituted body as *worthless, and all proceedings based upon it void.*"

Also in People *vs.* McNamara, 3 Nev., 75, the court states:

"An indictment found by a jury not legally constituted *cannot be valid.*"

Also in the case of McEvoy *vs.* State, 9 Neb., 163, it is stated:

"The grand jury must be selected in the manner prescribed by law. There is no security to the citizen, but *in a rigid adherence to the legislative will as expressed in the statute* for our guidance."

Also in the case of Stokes *vs.* State, 24 Miss., 623, it was held that a grand jury consists of the requisite number of competent individuals selected, summoned, empaneled legally and sworn *according* to the *forms of law,* and if the law be not followed the grand jury is incompetent to perform legal acts.

To the same effect it was held in the case of Raiey *vs.* State, 10 Texas Appeals, 481, where the court stated:

"A valid indictment is an indispensable prerequisite to a legal prosecution for felony."

Also to same effect see Finley *vs.* State, 61 Ala., 201; Nordan *vs.* State, 39 Sou. Rep., 406 (Ala.), where it was held that the indictment was void.

Also to same effect: State *vs.* Feizzell (La.), 38 Sou. Rep., 444; State *vs.* Mercer, 61 Ala., 220, where the indictment was held to be void.

In the case of United States *vs.* George Reynolds, reported in 1 Utah, 226, the court uses the following language:

"The principal difficulties in the case arise in reference to the constitution of the grand jury which found the indictment upon which conviction was had. The indictment was found by a grand jury of twenty-three men under the United States statutes. The territorial statute provides for a grand jury of fifteen men. The court held that the statute must be followed and reversed the case."

Also to same effect see case of Burley *vs.* State, 1 Neb., 390.

In the case of Dutell *vs.* State (Iowa), 4 Greene, 125, it is stated:

"It is true as a general rule that when the indictment is duly exhibited in open court and endorsed a true bill, it is evidence that it was duly found by a legal jury, but when the records of the court show that the grand jurors were not legally selected and had no authority to act it is evidence of a higher grade and shows that the indictment could not have been found, exhibited and endorsed by legal authority."

In the case of Thorp *vs.* People, 3 Utah, 441, it is stated:

"Were the grand jury summoned in a manner prescribed by statute, since if they were not *they had po power* to find a valid indictment."

On page 442 the court states:

"The manner of summoning, the time required, the mode of selecting are all expressly laid down, leaving nothing to be implied or in doubt. The law is explicit and *must* in *every* respect be complied with."

In the case of State of Louisiana *vs.* Singleton Parks, reported in 21 La., 251, opinion delivered by Chief Justice Ludeling, the question was raised in this case after conviction that one of the grand jurors who participated in finding the bill was not a citizen of the United States nor a duly qualified voter under the law of the State. The court stated:

"It appears from the record that Robert Coulter, one of the persons composing the grand jury was incompetent, and that this fact was not known to the defendant until after the trial. Can this objection be urged after verdict. Quoting from Mr. Wharton 'A new trial would be granted at common law where it appears after verdict that some one of the jurors should not have been permitted to sit upon the trial on account of an entire legal incapacity.' "

Citing Wharton, sec. 923; State *vs.* Babcock, 1 Conn., 401.

And then the court proceeded to quote from Hawkins' Pleas of the Crown, book 2, chapter 25, sections 26, 27, 28:

" 'That if any one of the grand jury who find an indictment be within one of the exceptions of the statute he vitiates the whole, though ever so many unexceptionable persons joined with him in finding it.' We feel satisfied that this construction furnishes the nicest and safest rule of decision, and that the incompetency of one of the grand jurors so to find a bill of indictment *vitiates* the whole proceeding. One of the qualifications of a grand juror in Louisiana is that he shall be a qualified elector of the State of Louisiana (Acts of 1868, No. 110). Coulter not being a qualified elector of the State was not a competent juror and a bill of indictment found by a grand jury of which he was a member *was a nullity.*"

In the case of Wm. Nichols at suit of the State, 5 N. J., 543, the court stated:

"The defendant can only be put to answer an indictment legally found and presented. A grand jury has no authority to inquire and present unless legally empaneled. * * * It has no right to present, nor are its presentations *sufficient* to put the *defendant on trial.*"

In the case of Crouch *vs.* State of Alabama, 63 Ala., 161, after the panel had been exhausted and an insufficient number to complete the jury, the trial court, instead of having the sheriff summon from the qualified voters of the county, as required by law, ordered him to summon five talesmen to

complete the jury. The court held that the indictment should have been quashed.

In the case of Doyle *vs.* State, 17 Ohio, 224, it was held that an indictment found by a grand jury composed of fourteen members was *void,* as there was no grand jury, the law requiring fifteen. The court further stated:

"No objection comes too late which discloses the fact that a person had been put to answer a crime in a *mode violating his legal and constitutional rights.* The doctrine of waiver has nothing to do with criminal prosecutions of this kind."

Citing Vatter *vs.* State, 4 Black (Indiana).

In the case of McQuillan *vs.* State, 8 S. & M., after reciting the provisions of the law relative to grand jurors, the court said:

"In view of these several provisions it is believed that a grand jury composed of members who do not *possess* the *requisite qualifications,* or who have not been *drawn, summoned and empaneled* in accordance with the law *have no power* to find a valid indictment."

Stokes *vs.* State, 24 Miss., 621, wherein it was held:

"A grand jury summoned in any other mode than that directed by law has no authority to find an indictment, nor will the *act* of the court in *causing said jury* to be *empaneled supply the defect* as to their selection."

Citing State *vs.* Wilson, 5 Port. (Ala.), 130. In this case the court released on writ of *habeas corpus.*

It was held in the following cases that the grand jury must be selected, drawn and empaneled according to law to give the court jurisdiction in a criminal case:

Lott *vs.* State, 18 Tex. App., 627; People *vs.* Coffman, 24 Cal., 294; McMillan *vs.* State, 19 Tex. App., 48.

In Porter *vs.* State, 23 Miss., 578, it was stated:

"The court has no power to select a grand jury only as given by statute."

In 9th Enc. Law, 1 ed., p. 6, we find this language:

"Courts are strict in the observance of statutory regulations in regard to empaneling grand juries."

Several cases cited.

To same effect we cite Thompson & Merriman on Juries, sections 492-493-494-500-520.

Also case of United States *vs.* Antz, 16 Federal Rep., 119, wherein it was held that an order directed to the marshal of the wrong district would render a grand jury summoned thereunder and all its proceedings void.

We contend that the pretended indictment upon which the petitioner was convicted under all the authorities was no indictment at all; that it is the same as though he had been convicted without an indictment; that it was wholly insufficient to give the court jurisdiction over the person of the defendant, and that it will come within the scope of the language used by this court in the case of United States *vs.* Gale, 109 U. S., 71, through Mr. Justice Bradley. While it was held in that case that the errors there were mere irregularities and did not affect the jurisdiction of the court, yet it pointed out that in cases like the one now before the court the writ of *habeas corpus* would undoubtedly lie. The language used is as follows:

"There are cases, undoubtedly, which admit of a different consideration, and in which the objection to the grand jury might be taken *at any time*. These are: where the whole proceeding of forming the panel is void, as where the jury is not a jury of the court or term in which the indictment is found, or has been selected by persons having no authority whatever to select them, or where they have not been sworn, or where *some other fundamental requisite has not been complied with*. But there is no complaint of this kind in the present case."

We contend that the undisputed record in this case brings this case within the rule announced above.

ARGUMENT AND AUTHORITY UNDER NINTH PROPOSITION.

Section 2907 of Wilson's Annotated Statutes of Oklahoma:

"The term 'qualified elector' within the meaning of this act shall include all male persons of the age of twenty-one years or upward belonging to either of the following classes: who have *resided* in the Territory for a period of *six months*, in the township sixty days, and the voting precinct thirty days first preceding an election."

"SECTION 3308. All male persons *residing* in any of the counties of this Territory having the qualifications of electors, and being over the age of twenty-one years, and of sound mind and discretion, and not judges of the Supreme Court or district court, clerk of the Supreme Court or district court, sheriff, coroner, licensed attorneys engaged in practice, or any person licensed to sell liquor, or an habitual drunkard, and not subject to any *bodily infirmity* amounting to *disability*, and who have not been convicted of a criminal offense punishable by imprisonment in the penitentiary, etc., are and shall be competent persons to serve on all grand and petit juries, either in their county or subdivision, respectively.

"SECTION 3309. No jury shall be summoned except by order of the judge of the district court, who shall issue an order to the clerk of said court that a jury shall be summoned, and such order shall specify the number of petit jurors that shall be summoned and the time and place where they shall appear, and said order shall be issued at any time within thirty days before the first day of the term of district court, or at any time during the term of said court."

Section 3310 reads that the grand jury shall be summoned in the same manner provided for summoning petit jurors.

"SECTION 3313. It shall be the duty of the county clerk at the time the poll books are prepared to have printed thereon in blank form an oath to the following effect: 'We, the undersigned judges of election in and for district ——, do solemnly swear that when the polls are closed and at the time we make a poll of the votes cast we will examine the list

of names on the poll books and therefrom we will select —— names and return to the county clerk to serve as jurors. That in making such selection we will select only such persons as are to us known to be of good moral character and sound judgment, and of unquestionable integrity, and that we will not select any person in the habit of taking intoxicants, who has been convicted of any felony, or who is engaged in the sale of intoxicating liquors, or who is known to be a participant in or engaged in any unlawful business, or whom we believe could be bribed, or who are of doubtful qualifications as jurors, so held us God.'"

And the provision is then made for the jurat.

It is further provided that the county clerk shall, before the poll books are delivered to the election judges, estimate the number of jurors that will be required to be drawn from each election precinct. It further provides that when the election is over the judges of election shall examine the list of names on the poll books and select the number of persons designated by the clerk and possessing the qualifications required by the act to serve as jurors, and shall make a list of same and shall sign and return same to the county clerk.

It further provides that it shall be the duty of the county clerk to write the names so returned on slips of paper and place them in a box with lock and key and keep the same locked, and from the names so placed in this box the grand and petit jurors shall be drawn. Within ten days before the sitting of any term of the district court the judge shall certify to the district clerk the number of persons desired for the grand and petit jury, or both. Thereupon the clerk of the district court shall summon the sheriff, or any of his deputies, and the county clerk and shall take the box containing the names of jurors so returned and shall shake the same, and the box shall then be opened in the presence of all three of said officers, and placed in such a position that they cannot see into it. And then each officer shall in turn draw a name therefrom and make a record thereof until the required number of grand and petit jurors be drawn. The names first

drawn shall constitute the grand jury and the latter the petit jurors for the term to which they are drawn, and each slip containing the name drawn from the box shall be destroyed.

There is a provision made in this section to meet any emergency when the judges of election shall fail to make returns, as follows: "If from any cause the judges of election shall fail to make return of jurors for their precinct it shall be the duty of the county commissioners to take the poll books from that precinct and select the number of persons required to serve as jurors from that precinct, and in making such selection shall exercise the same care as required herein of judges of election, and the list so selected by the county commissioners shall be received in lieu of the one required to be made by the judges of election."

Said section further provides that it shall be the duty of the county clerk to prepare and have printed a sheet containing the law with regard to the qualifications of jurors and the directions to the judges of election and have same attached to the face of the poll books before the same are sent them.

There is another proviso made in this section to meet an emergency under other circumstances, as follows:

"*Provided, further,* That if the list of jurors as prepared under the provisions of this act is destroyed or lost it shall be the duty of the county clerk to immediately prepare lists as herein provided for and send such lists to each township and city assessor, who shall select from the tax-payers of his township or city the number of suitable and legal jurors as indicated by the clerk, and such assessor shall immediately return said list to the county clerk, and said county clerk shall from said list returned by said assessor prepare the jury list."

Under section 3314 it provides that any juror failing to appear who has been summoned shall be in contempt, etc., and further provides: "And if the judges of election or county commissioners of any county, willfully neglect or fail to select

and furnish to the clerk names of persons as hereinbefore provided, such person so offending shall be fined by the court not less than $5.00 nor more than $25.00; and if the clerk of the district, or deputy clerk, sheriff or deputy sheriff, or coroner shall neglect or fail to perform the duties imposed by this act the persons so offending shall be deemed guilty of contempt and shall be fined by the court not less than $5.00 nor more than $25.00, and if guilty of gross misconduct in disregarding the provisions of this Act may be imprisoned by the court no longer than thirty days in the county jail."

It can hardly be questioned that this statute is mandatory. The only excuse the court made for disregarding the statute is that there had been no election held at the time the grand jury was empaneled; or, in other words, the conditions were such temporarily that the court declared the law inapplicable at that time to that particular county. If we concede the court this power in one case it must be conceded in every case and to each trial court and to each judge presiding in each trial court, whenever in the opinion of the judge certain conditions exist making the local statute inapplicable, then he has the power and authority to disregard the statute, or repeal it, so to speak, for the time being, and call into existence the common-law procedure. It seems that this would be giving the trial court the most liberal and unlimited power, not only to legislate, but repeal and supersede statues.

It has proven to be true in the Territory of Oklahoma since the decision by the Circuit Court of Appeals for the Eighth Circuit in the case of Sharp *vs.* United States, above referred to, that there have been conditions existing in the different counties which rendered illegal most every grand jury theretofore provided for, tested by the decision in the Sharp case, and it was found necessary to secure an act of Congress to relieve the conditions, which was passed the last session, providing for a new method and mode of procuring grand jurors before the court could proceed with the criminal

business of the Territory. If the court has power to do what it did in this case, then the act of Congress was unnecessary, and the courts would only have had to declare the conditions such that the statutory law was inapplicable and proceed under the common law; but this, we think, is too utterly unreasonable for argument.

ARGUMENT AND AUTHORITY UNDER THE TENTH PROPOSITION.

DID THE TRIAL COURT IN THE CASE AT BAR OVERRIDE A PLAIN STATUTE AND DID THE PETITIONER DO ALL HE WAS CALLED UPON TO DO IN ORDER TO PROTECT HIS RIGHTS?

It is conceded that the indictment was not found according to statute.

It will be seen by referring to the record, page 19, that the petitioner filed his motion and set up in detail the reasons why the indictment should be quashed and set aside, as is shown by said motion made an exhibit to the petition. It is also shown from the record that the facts were conceded to be true.

It will also be seen by reference to page 6 of the record, ninth paragraph of the petition, that the petitioner was not present when the proceedings of the grand jury were had, and the first opportunity he had he presented his motion to have the indictment quashed.

Section 5399 of Wilson's Annotated Statutes of Oklahoma provides:

"The indictment *must* be set aside by the court in which the defendant is arraigned and upon his motion in either of the following cases (1), when it is not found, endorsed, presented or filed as prescribed by the statutes of the Territory or when the grand jury is not drawn and empaneled as provided by law and that fact is known to the defendant at or before the time the jury is sworn to try the case."

Section 5400 provides:

"If the motion to set aside the indictment be not made the defendant is precluded from afterwards taking the objections mentioned in the last section except the one that the jury was not drawn and empaneled as provided by law and that may be done as ground for a new trial when showing is made that these facts were not known to the defendant or his counsel until after the jury were sworn for the trial of the case."

We think the Circuit Court of Appeals for the Eighth Circuit in the case of Sharp *vs.* United States, above referred to, correctly held that this statute was beyond the discretion of the trial court; that after it was ascertained that the grand jury was not empaneled and sworn as required by law the court had no discretion, and when these facts were admitted to be true in refusing to set aside the indictment the court was simply acting beyond its jurisdiction and transcending a plain statute.

This motion was not only made and overruled by the trial court, but it will be noticed by the record that it was also made a ground for a new trial and motion in arrest of judgment, each of which was by the court overruled, and from these different judgments of the court an appeal was prosecuted. So it will be seen that he has exhausted every remedy known to him by the ordinary modes, and we contend that if a petitioner has ever placed himself in a position to come within the rule laid down by this court in *habeas corpus* proceedings the petitioner in the case at bar has done so.

We only desire to say further under this proposition that we think the record in this case shows conclusively that the petitioner has brought himself within the rules laid down by this court in the different cases cited and referred to in this brief, and that it is a proper case for his release by the writ of *habeas corpus.*

ARGUMENT AND AUTHORITY UNDER ELEVENTH PROPOSITION.

In section 9 of the act of Congress known as the organic act of Oklahoma, being section 69, page 75, 1st vol., Wilson's Annotated Statutes of Oklahoma, this provision is found:

"The Territory not embraced in organized counties shall be attached for judicial purposes to such organized county or counties as the Supreme Court may determine."

In section 10 of said act of Congress, section 70, page 77, of Wilson's Annotated Statutes, we find this provision:

"All offenses committed in said territory if committed within any organized county shall be prosecuted and tried within said county, and if committed within territory not embraced in any organized county shall be prosecuted and tried in the county to which said territory shall be attached for judicial purposes."

It will be seen from these quotations that the condition of this particular portion of the territory wherein said alleged crime was committed at the date of the commission thereof—that is to say, whether it was or was not an organized county—fixed the venue and place of trial.

Further on in this section it provides that even a civil suit arising in a portion of the territory not embraced in an organized county must be instituted in the county to which said territory is attached for judicial purposes.

It is admitted that at the date of the commission of this crime this portion of the territory was a portion of an unorganized county and was not embraced in any organized county, but that the same was on said date attached to Canadian county for judicial purposes; that there had been no law of any kind changing the place of trial or in any way affecting the order of the Supreme Court attaching the same to Canadian county. It was not a question of a division of a county wherein provisions are made for the trial of pending

cases, but simply a question of construction of the act of Congress, and as the act is plain and unambiguous it will fall within the general rule of the construction of statutes, and that is that there is no construction to be placed upon it except the plain import of the language used.

We contend that the only question is, Did Congress have authority and power to fix the place of trial of criminal cases, as it undertook to do under this provision? We take it that this, however, will not be controverted, as being a crime committed out of the jurisdiction of any State, that under the Constitution Congress might provide for the prosecution and trial at any place.

We think the case of George W. Post *vs.* United States, reported in 161 U. S., Book 40, p. 816, is somewhat in point; however, the facts and conditions were not the same, but the same principle is adhered to.

We contend that it being not denied that at the date of the alleged commission of the crime for which the petitioner is charged that particular portion of the territory wherein the same was committed was an unorganized county, and it having theretofore been attached to Canadian county for judicial purposes under the act of Congress, the venue was as much within Canadian county as though the Congress of the United States had provided in so many words that "all crimes committed in that portion of the territory prior to August 6, 1901 (the date of the opening of the county), shall be prosecuted and tried in Canadian county." It seems to us too plain for argument.

ARGUMENT AND AUTHORITY UNDER TWELFTH PROPOSITION.

Section 5339 of the Revised Statutes of the United States provides as follows:

"Every person who commits murder (1) within any fort, arsenal, dock yard, magazine, or within any other place or district of country under the exclusive jurisdiction of the United States. * * * Shall be guilty of murder, and punished," etc.

The petitioner alleges that this alleged crime was committed on the 4th day of August, 1901, two days prior to the opening of the Kiowa-Comanche-Apache Indian reservation for settlement; that on said day and date and at all times prior thereto it was under the exclusive jurisdiction of the United States; that, recognizing that jurisdiction, the Government did in fact exercise jurisdiction over said country where said alleged crime was committed on the 4th day of August, 1901, and, recognizing the fact that it was a crime against the Government of the United States, the United States attorney appeared and conducted the prosecution of said crime charged against the petitioner.

While the petitioner does not contend that these facts are conclusive that it is a crime against the Federal Government, yet our contention is that although the law had been passed for the opening of this country for settlement, yet until the country was actually opened for settlement it was still under the exclusive jurisdiction of the United States Government; that Congress could have at any time passed another act, prior to the opening of the country for settlement, and repealed that act and could have withdrawn said country from settlement indefinitely, or could have reserved it perpetually for an Indian reservation or for military purposes, or for any purpose the United States might desire to use the same, and said country did not pass out from under the control and

power of the Government until it was actually opened up for settlement on August 6, 1901.

We think it is clear that the Government did rightfully exercise exclusive control and jurisdiction over that portion of the country up until the 6th day of August, 1901, as shown by the President's proclamation, issued on the 4th day of July, 1901. The proclamation reads as follows:

"Now therefore, I, William McKinley, President of the United States of America, by virtue of the power vested in me by law, do hereby declare and make known that all of the lands so as aforesaid ceded by the Wichita and affiliated bands of Indians, and the Comanche, Kiowa, and Apache tribes of Indians, respectively (saving and excepting the different tracts of land reserved for different purposes), will on the 6th day of August, 1901, at 9 o'clock a. m., after the manner herein prescribed and not otherwise, be opened to entry and settlement and disposition under the general provisions of the homestead and town-site laws of the United States."

Another provision contained in said proclamation:

"Each applicant who shows himself duly qualified will be registered and given a *non-transferable certificate* to that effect, which will *enable him to go upon and examine the lands to be opened* up within the land district in which he elects to make his entry, but the *only purpose for which he may go upon and examine said lands* is that of enabling him later on, as herein provided, to intelligently select the land for which he will make entry. No one will be permitted to make settlement upon any of said land in advance of the opening herein provided for," etc.

And again, another provision:

"All persons are especially admonished that under said act of Congress approved March 3, 1901,, it is provided that no person shall be permitted to settle upon, occupy, *or enter any of said ceded land* except in the manner prescribed in this proclamation," etc.

This seems to us to be conclusive of the fact that the construction placed upon the law by the President of the United States was that it was under the exclusive jurisdiction of the Federal Government until the country was actually opened for settlement. While this would not be conclusive upon the court, yet it would be persuasive, and certainly if this particular portion of the country was not under the exclusive jurisdiction of the United States the President nor any other official of the Government would have had no right to restrict the free movement of any United States citizen within and upon this land, and while it may have ceased to be an Indian reservation after the approval of the act of Congress ratifying the agreement with those tribes, yet still if it was under the exclusive jurisdiction of the United States a crime committed there would nevertheless be a crime against the Federal Government.

The only question is whether or not it was under the exclusive jurisdiction of the United States on August 4, 1901. If so, then it needs no authority to convince the court that it was a crime against the Federal Government and not against the territorial government, and we think it not necessary to prolong this portion of the argument or to cite any other authority in support thereof.

ARGUMENT AND AUTHORITY UNDER THIRTEENTH PROPOSITION.

DOES THE RECORD SHOW THAT THE PETITIONER WAS COMPELLED BY THE COURT TO FURNISH EVIDENCE AGAINST HIMSELF?

It will be noted that the petition alleges that one of the main contentions of the Territory in the trial of the petitioner herein was that one of the parties who participated in the highway robbery and murder of Joseph Philip Beenblossom was of a certain height, a certain build and weight,

of a certain appearance, and had a peculiar walk; that these facts were detailed by the witnesses for the prosecution before the jury, and that in order to more thoroughly establish said contention the petitioner was compelled, over his objection, to stand up, exhibit himself, and walk before the jury, and that the jury was stationed during the recess of the court, outside of the court-room and between it and the jail, by the officer in charge, for the purpose and in order that they might take notice of the petitioner and his peculiar walk as he was carried by them by the officer, and that they did in fact take such notice and observed his walk and general appearance, size, etc. We contend that this comes within the inhibition of the fifth amendment to the Federal Constitution. While it is not testimony in words, yet it is in fact the strongest character of testimony, extorted from the petitioner by the court over his objection.

It was one of the petitioner's constitutional rights to remain silent and with his arms folded during the progress of the trial, and he could not have legally been forced and compelled in any way to contribute by either words, acts, or conduct in furnishing evidence for his conviction. To establish the identity of the petitioner it was necessary for the Territory to produce witnesses, which was done, to try to identify the persons guilty of the commission of the crime charged, and, as ordinarily true in such cases, this character of testimony is necessarily opinion testimony and is not relating facts as ordinarily understood by that term. Witnesses usually try to identify the defendant as comparing him with the person they saw at the place and during the commission of the crime. This was the character of the testimony introduced by the Territory on the trial of the petitioner. Witnesses related before the jury, as shown by the petition, the size of the party alleged to be the petitioner, his peculiarities, his weight, height, and peculiar walk, which they claimed one of the parties had. Then the Territory not being satisfied with the identity of the party or

feeling that the jury might not be thoroughly convinced of that fact, the petitioner then, in order to corroborate the witnesses for the Territory, was forced and compelled, over his objection and protest, to stand before the jury in order that they might measure him and for the purpose of weighing him in their own minds, and walk, for the purpose of detecting his peculiar walk, and by that means compared him—his actual appearance, size and peculiarities—with the story related by the witnesses, in order to make up their minds or verdict as to the identity of the petitioner. This, it seems to us, was the strongest character of testimony, and the petitioner, against his will and over his objection, was forced and compelled to contribute to his own conviction, which we claim is inhibited by the fifth amendment to the Constitution.

We realize that there is a cantrariety of opinion by the different courts upon this proposition, but we are forced to the conclusion that it has arisen by reason of the difference in language used in the different State constitutions and from the circumstances of each case, and that in reality there is but little conflict as to the application and the soundness of the doctrine contended for by the petitioner. Many courts have held in cases that it was not invading the defendant's constitutional rights by reason of the fact that the court permitted the defendant to stand up and be exhibited to the jury, but when they were examined closely it is on the ground that the defendant had complied with the request of the prosecutor or the court without making any objection and thereby waived his constitutional right. In other cases it was held that it was not an invasion of the defendant's constitutional right for the reason the wording of the Constitution was that the defendant should not be compelled "to testify against himself in criminal cases," and this is construed to mean oral testimony, by words and not by acts; but we don't believe there is a case on record where the provision of the Constitution is worded as it is in the fifth

amendment to the Federal Constitution and where it has been construed as that provision has been by this court in the case of Boyd *vs.* United States, 116 U. S., 616-641, where the trial court has forced the defendant to exhibit himself and stand before the jury for the purpose of identification and corroboration, that the court has not held it was error and an invasion of his constitutional right.

Many other cases have gone to the Supreme Courts of the different States where witnesses while testifying have been requested by the prosecutor to point out the defendant, and in cases where the defendant has been requested to stand and allow the witness to see him, which request was complied with without any objection at the time, but where counsel afterwards made objection in the cases and raised it on appeal that it was an invasion of his constitutional rights, and in these cases the courts have decided that simply the pointing to the defendant by the witnesses was not compelling him to give evidence against himself or to be a witness against himself, or that if the defendant was requested to stand up for the purpose of identification that he had done so without objection.

In vol. 16, 2d ed., Enc. Law, p. 818, under head of "Inspection and physical examination," the writer states:

"In England it has been held that the compulsory examination of the person of the defendant in a criminal case cannot be ordered, and there have been decisions to the same effect in the United States, though the contrary has been held."

Citing:

Agnew *vs.* Jobson, 13 Cox C. C., 621.
Blackwell *vs.* State (Ga.), 3 Crim. L. Mag., 393.
People *vs.* McCoy (Sup. Ct.), 45 How. (N. Y.), 216.
State *vs.* Jacobs, 5 Jones (50 N. C.), 259.

It was held in the case of Day *vs.* State, 63 Ga., 667, that the defendant could not forcibly be compelled to place his

foot in the footprints near the scene of the crime, as that would be compelling him to incriminate himself by acts.

In People *vs.* Mead, 50 Mich., 228, it was held that the defendant could not be required, against objection, to try on a shoe to determine whether the tracks found at the scene of the offense were his own.

In Stokes *vs.* State, 5 Baxter (Tenn.), it was held it was improper for the prosecuting attorney to place a pan of soft earth in front of the jury and request the defendant to make a footprint in it.

In vol. 30, 2d ed., Enc. Law, under head of "Witnesses," p. 1160, the writer states:

"It is generally held that it is a violation of the constitutional privilege of the witness to compel him to submit to a physical examination or to make experiments in the presence of the jury which tend to criminate himself."

Citing:

Cooper *vs.* State, 86 Ala., 610; 11 Amer. St. Rep., 84.
Davis *vs.* State, 131 Ala., 10.
State *vs.* Garrett, 71 N. C., 85; 17 Amer. Rep., 1.
State *vs.* Graham, 74 N. C., 626; 21 Amer. Rep., 493.
Walker *vs.* State, 7 Tex. App., 245; 32 Amer. Rep., 595.
State *vs.* Nordstrom, 7 Wash., 506.

Quoting from Underhill on Criminal Evidence, page 65, section 53, under definition of "Real evidence:"

"Real evidence means evidence which is obtained through the sight by the actual inspection of the person or thing by the judge or jury in open court. * * * The question is when may the accused be compelled to submit to an examination by the jurors. Inspection and comparison of persons by the jury have been frequently allowed where race or color was in issue. This is wholly unobjectionable if the accused shall consent thereto or if he desired to introduce the evidence in his own behalf. * * * Hence it has been

held that the accused not being a witness cannot be compelled to stand up before the jury in order that they may ascertain from inspection to what race he belongs."

Citing State vs. Jacobs, 5 Jones (N. C.), 259.

Some of the courts have held that it was not an invasion of the defendant's constitutional right for the defendant to stand up at the request of the court in order that the witness might look upon him, on the theory that the orderly conduct of a criminal trial required that the court should have full power to say what place the prisoner should occupy, when he should stand or sit, and where he should remain in the presence of the court and jury, etc. Or, in other words, that the prisoner has not the constitutional right to sit in any particular position or in any particular place in the court-room in the presence of the court and jury. This is probably true, yet it is an entirely different thing from what was done in the case of the petitioner, when he was not requested to stand for the purpose of a witness looking upon him, but was exhibited and required to stand, exhibit himself, and walk before the jury for the purpose of identification, that they might compare him with the person described by the witnesses on the witness stand. It was not done for the purpose and in order to facilitate the business of the court, or was not necessary for any other purpose except for the sole purpose of furnishing testimony for the Territory for the identification of the person described by the witnesses as guilty of the commission of the crime charged.

Again, on page 67, section 54, Underhill on Criminal Evidence:

"The accused cannot object if he is identified without being required to stand. So, if he voluntarily stands up and the witness identifies him, without objection, he cannot be granted a new trial upon the ground that he has been compelled to testify against himself."

It has always been the rule in the English courts, and in the absence of a written constitutional provision inhibiting such, that the accused cannot be compelled to give evidence against himself.

We find that the leading case denying the court the right to compel a person, over his objection, to stand and exhibit himself before the jury as invading his constitutional rights is the case of State *vs.* Jacobs, 5 N. C., 259, above cited.

There have been a number of cases decided in the same State subsequent, wherein they have held that it was not error in the trial court; but in each of them they take occasion to distinguish them from the Jacobs case, and that case so far has never been overruled by any subsequent decision, and by distinguishing the cases subsequently decided by the court upon that point it has the effect to approve this decision.

We also find upholding the same doctrine the following cases:

Blackwell *vs.* State, 67 Ga., 76.
Stokes *vs.* State (Tenn.), 5 Baxter, 619; 30 Amer. Rep., 72.
Rice *vs.* Rice, 11 L. R. A., 591; 47 N. J. Eq., 559.
Day *vs.* State, 63 Ga., 667.
People *vs.* McCoy, 45 Howard, 216.
People *vs.* Walcott, 51 Mich., 612.
People *vs.* Mead, 50 Mich., 228.
Emery *vs.* Case, 117 Mass., 181; 9 Amer. Rep., 22.

We also find the leading case in America holding to the opposite rule and upholding the right is the case of State *vs.* Ah Chuey, 14 Nev., 79; 33 Amer. Rep., 550; but in this case there was a very elaborate dissenting opinion holding that such was against the provision of the Constitution, and that distinction was drawn between constitutional provisions prohibiting the compelling a person to give "evidence" against himself, or to be a "witness" against himself, and

those providing that no person shall be compelled to "testify" against himself, the latter being held to afford less protection than either of the others.

Many of the cases upholding the right of the court to have the defendant to stand up were upon the theory that the defendant had waived his constitutional right.

In addition to the above authority, we desire to refer to and quote from the case of Boyd *vs.* United States, 116 U. S., 616-641, above referred to.

The court, on page 633, uses this language:

"We have already noticed the intimate relation between the two amendments. They throw great light on each other; for the 'unreasonable search and seizure' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment, and compelling a man in 'criminal cases to be a witness against himself,' which is condemned in the fifth amendment, throw light on the question as to what is a reasonable search and seizure within the meaning of the fourteenth amendment, and we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms."

And again, on bottom of page 634, it is stated:

"* * * And we further are of the opinion that the compulsory production of the private books and papers of the owner of goods is compelling him to be a witness against himself within the meaning of the fifth amendment to the Constitution, and is the equivalent of a search and seizure."

It is clear to us that if the procuring of the defendant's private books and papers without his consent is compelling him to be a witness against himself, then much stronger is the reason for holding that where he is compelled to exhibit himself and walk before the jury for the sole purpose

of identification is within the inhibition of the fifth amendment to the Constitution.

The above case was cited with approval in the later case of Councilman *vs.* Hitchcock, reported in 142 U. S., 547-586; opinion delivered by Mr. Justice Blatchford.

On page 566 we find this language:

"Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case that a witness by disclosing a single fact may complete the testimony against himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself may be unavailing, but all other facts without it would be insufficient."

It seems, too, that this language of the court might well apply to the case at bar. It is very possible, and in fact probable, that without the additional testimony which the petitioner was compelled to furnish the jury might have not been satisfied beyond a reasonable doubt that he was one of the parties guilty of the crime. Being allowed in that manner to measure his height, to ascertain his weight, his general appearance, and by his walking detect his peculiar walk may have furnished the missing link in the testimony or evidence to secure his conviction. Without it they might have concluded that the testimony of the witnesses was simply opinion, but corroborated by it they may have been convinced that he was the guilty party.

As the record may not be as clear as it should be as to whether or not the petitioner undertook to take the witness stand in his own behalf, we state as a matter of fact, without any fear of contradiction, that he made no attempt to take the witness stand in his own behalf; made no attempt whatever to in any way become a witness in his own behalf.

We therefore believe, in view of the authorities herein

cited and with the admitted facts in this case, that the court invaded his constitutional rights when he was compelled to contribute to his conviction, as shown by the record in this case, and for that reason, if no other, the verdict and judgment of the court is void.

ARGUMENT AND AUTHORITY UNDER FOURTEENTH PROPOSITION.

WILL THIS COURT INTERFERE WITH THE ADMINISTRATION OF THE LAWS OF THE TERRITORY, BY ITS COURTS, EVEN WHERE FUNDAMENTAL RIGHTS ARE DISREGARDED?

This proposition raises the question whether the rights guaranteed under the fifth amendment to the Federal Constitution apply only to one branch of the territorial government or to all the branches of the territorial government, for it has been directly held that the sixth amendment is an inhibition upon the legislative branch of a territorial government; now, how about the judicial branch?

We are familiar with the rule, laid down by this court in a number of cases, that the Federal court will not interfere with the State courts in the construction and administration of her laws, except where fundamental rights guaranteed by the Federal Constitution are violated. We think it is well settled that where the courts of the State wholly disregard the fundamental rights guaranteed to a citizen by the State constitution and State laws, which come within the fourteenth amendment to the Federal Constitution, this court would not hesitate to declare such action of the courts void, notwithstanding the legislative branch of the State had violated no provision of the Federal Constitution in enacting such laws; or, in other words, we contend that the judicial departmetn of the Territory, as well as the judicial officers, can no more proceed in such a manner by disregarding the

law of the Territory or State which is in harmony with the fifth amendment to the Federal Constitution, and by that means take away or deprive a citizen of his constitutional rights, than can the legislature by direct enactments take away such rights; that the safeguards contained in the Constitution and the different amendments apply as much to one department of the Territory, as well as the judicial officers, department cannot indirectly proceed in such a manner as would be in conflict with the provisions of the Constitution were it the acts and proceedings of another department which would be in direct conflict with those provisions.

It was held by this court in an opinion delivered by Mr. Justice Day, on November 27, 1905, in the case of Mary Mabel Rogers, appellant, *vs.* Henry H. Peck and Wilson S. Lovell, upon a petition for writ of *habeas corpus:*

"The reluctance with which this court will sanction Federal interference with a State in the administration of its domestic law for the prosecution of crime has been frequently stated in the deliverances of the court upon the subject. It is only where fundamental rights, specially secured by the Federal Constitution, are invaded, that such interference is warranted."

Citing:

Ex Parte Reggel, 114 U. S., 642; 29 L. Ed., 250; 5 Sup. Ct. Rep., 1148.

Re Converse, 137 U. S., 624; 34 L. Ed., 796; 11 Sup. Ct. Rep., 191.

Hodgson *vs.* Vermont, 168 U. S., 262; 42 L. Ed., 461; 18 Sup. Ct. Rep., 80.

Brown *vs.* New Jersey, 175 U. S., 172; 44 L. Ed., 119; 20 Sup. Ct. Rep., 77.

Re Frederick, 149 U. S., 70; 37 L. Ed., 653; 13 Sup. Ct. Rep., 793.

The only contention that can be made by the respondent in this case why the court should not release the prisoner

in this proceeding would be that the petitioner, as has been repeatedly held, is trying to use the writ of *habeas corpus* for a writ of error or appeal. But, fully realizing, as we believe we do, the distinction between the two, and while we admit that the errors complained of herein are such that would have reversed the case had there been any provision by which it could have been reviewed by this court on writ of error, yet, notwithstanding such facts, if the errors were such that the trial court failed to obtain jurisdiction over the petitioner, or lost jurisdiction by errors committed in invading the petitioner's constitutional rights and in transcending plain statutes enacted for the guidance of the court and the protection of the petitioner, then this court will not fail to do its duty and release the petitioner simply because the trial court committed grievous errors, which errors resulted in the unconstitutional and void conviction, especially as the petitioner has exhausted every other remedy given him under the law. The trial court never invades a defendant's constitutional rights without committing error; the trial court never acts in a matter beyond its jurisdiction without committing error. But, as held by this court *In re* Neilson, referred to, it was not mere irregularity in the case at bar, but it was a question of depriving the petitioner of fundamental rights guaranteed him under the Constitution.

We contend in the face of the record, admitting the facts therein to be true, if this judgment can be valid for any purpose, then it is one case where there has been a grievous wrong without a remedy. While we realize the fact that this court cannot consider the question as to whether the defendant was guilty or innocent of the crime charged, yet if it was permitted to do so and take that in consideration in doubtful cases, the petitioner would be able to convince this court beyond any question of doubt of his innocence of the crime charged.

Believing as we do that the petitioner has been deprived of a constitutional trial, as shown by the record in this case,

and that therefore the judgment is absolutely void and of no force and effect, we come with full assurance that when this court has carefully considered the matter he will be released from such unlawful imprisonment.

Respectfully submitted,

FINIS E. RIDDLE,
WM. I. CRUCE,
Counsel for Petitioner.

FILE COPY

SUPREME COURT

OF THE

UNITED STATES

Office Supreme Court U. S.
FILED
MAY 16 1906
JAMES H. MCKENNEY

October Term 1906

8 Orig'l.

O. T. 1906

No. 8
Original

Ex Parte:
In the matter of George Moran,
Petitioner.

Answer of Respondent to Rule to Show Cause why Writ of Habeas Corpus and Certiorari should be discharged

W. O. CROMWELL,
Attorney General of Oklahoma Territory.
DON C. SMITH,
Assistant Attorney General
of Oklahoma Territory.
For Respondent.

THE STATE CAPITAL CO. GUTHRIE, OKLAHOMA

SUPREME COURT

OF THE

UNITED STATES

October Term 1905

Ex Parte:
In the matter of George Moran,
Petitioner.

No. 22
Original

Answer of Respondent to Rule to Show Cause why Writ of Habeas Corpus and Certiorari should be discharged

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RETURN TO WRIT OF HABEAS CORPUS AND CERTIORARI.

Comes now W. H. Haskell and makes this his return to the writ of habeas corpus and certiorari issued by the above named court on the 16th day of April, A. D., 1906, at the instance of George Moran, petitioner thereof.

And for his return to said writ of habeas corpus and certiorari the said W. H. Haskell alleges and says that he is now and has been since the first day of September, A. D., 1905,

the duly appointed, qualified and acting Warden of the State Penitentiary of the State of Kansas, located at Lansing in the County of Leavenworth State of Kansas. The said W. H. Haskill admits that as warden of the State Penitentiary of Kansas he has now and has had during the term of his office as such warden the said George Moran in his custody, and that the said George Moran has been and now is confined in the State Penitentiary at Lansing, Kansas as a convict, having been duly convicted of the crime of murder in the District Court of Comanche County, Oklahoma Territory, and pursuant to said conviction was duly sentenced by said court of Comanche County, Oklahoma Territory, to be confined in the Territorial prison for and during his natural life at hard labor. That under the laws of the Territory of Oklahoma the Governor of said Territory is authorized and empowered to contract in the name of the Territory of Oklahoma with the authorities of some other state or territory for the care and custody of such persons as may be convicted of crimes by the courts of Oklahoma Territory which are punishable by confinment in the penitentiary, and to bind said Territory for the faithful performance of said contract. That pursuant to the authority so conferred by the laws of Oklahoma the several Governors of said Territory have from time to time contracted with the Warden and penitentiary authorities of the State of Kansas for the confinment, imprisonment and maintenance of the convicts of the said Territory of Oklahoma, and at all times during the confinment and imprisonment of the said George Moran in the Kansas Penitentiary the said confinement has been in pursuance of said judgment and sentence of the District Court of Comanche County, Oklahoma Territory passed on him as aforesaid on the 22nd day of April, 1903, and pursuant to which he was duly transported to said Kansas Penitentiary and confined therein pursuant to existing contracts duly entered into and authorized by the law for the maintenance of convicts of Oklahoma in the Kansas State Penitentiary. That the contract now in force and effect between the Governor of the Territory of Ok-

lahoma and the duly constituted authorities of the State of Kansas was entered into by one E. B. Jewett, the predecessor of this respondent, as warden of the Penitentiary and the Board of Directors of the Kansas Penitentiary on the 31st day of January, 1905, and a true and correct copy of said contract is hereto attached and made a part of this return.

That by the laws of the Territory of Oklahoma it is provided that the sheriff of each county within said Territory shall convey to the penitentiary designated in the manner aforesaid all persons convicted in his county and sentenced to be confined in such prison. That the sheriff shall deliver such convict or convicts together with a certified copy of the judgment and sentence of the court ordering such imprisonment to the warden of such penitentiary who shall in turn deliver to the sheriff a receipt for such prisoner so received which receipt the sheriff shall file in the office of the Clerk of the Court where sentence was had.

That pursuant to the aforesaid requirements a certified copy of the judgment and sentence of the District Court of Comanche County, Oklahoma Territory, whereby the said George Moran was on the 22d day of April, 1903, sentenced to be confined in the penitentiary for the period of his natural life, was duly delivered to the Warden of the Kansas Penitentiary and was received by the said W. H. Haskell upon his coming into said office and ever since has been and now is in his possession, and a true and correct copy of said sentence of the District Court of Comanche County, Oklahoma Territory so delivered to the said Warden of the Kansas Penitentiary is hereto attached and made a part of this return.

Your respondent further answering denies that your petitioner was indicted by a federal grand jury or prosecuted by one Horace Speed, the then United States District Attorney for the District of Oklahoma, as alleged by your petitioner in the thirteenth paragraph of his petition, but your respondent on the contrary alleges the fact to be that your petitioner was

tried in the Distirct Court of the Fifth Judicial District sitting in and for the County of Comanche, Territory of Oklahoma. That the indictment is entitled "Territory of Oklahoma, Plaintiff vs. Mart Perkins, Bert Casey and George Moran, Defendants", and said indictment was signed by Walter C. Stevens, the then County Attorney of Comanche County, Oklahoma Territory; all of which is shown by a true and correct copy of the indictment with its endorsement thereon which copy is hereto attached and made a part of this return.

Your respondent, however, admits that the Honorable Horace Speed, the then United States District Attorney for the District of Oklahoma did appear at the trial of said case and assist in the prosecution thereof, having been employed by the father of Joseph Phillip Beemblossom to then and there appear and assist in the prosecution of said cause.

That the making of said contracts aforesaid and the confinement of said Oklahoma convicts in the Kansas State Penitentiary has been duly authorized and recognized by the laws of the State of Kansas.

That pursuant to the authority aforesaid that said George Moran is being duly and lawfully confined and imprisoned in the Kansas State Penitentiary as the Territorial Penitentiary of the Territory of Oklahoma for the purpose of serving out the sentence and judgment of the said court so imposed upon him as aforesaid.

WHEREFORE, Your respondent, the said W. H. Haskell, having fully answered, asks that the prayer of the petition of your petitioner be denied, and that he be remanded to the custody of your respondent and that these writs be discharged.

W. O. CROMWELL,
Attorney General of Oklahoma Territory.

DON C. SMITH,
Assistant Attorney General
of Oklahoma Territory.
For Respondent.

State of Kansas County of Leavenworth, ss.

W. H. Haskell of lawful age being duly sworn, upon his oath deposes and says, that he has read the foregoing return to the writ of habeas corpus and certiorari sued out by George Moran, and knows the contents thereof, and that the facts therein stated and that the allegations therein are true.

W. H. HASKELL

Subscribed and sworn to before me this 8th day of May, A. D., 1906.

CHARLES ERNST

Notary Public

My Commission expires July 24, 1906
(SEAL.)

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT SITTING IN AND FOR THE COUNTY OF COMANCHE, TERRITORY OF OKLAHOMA.

Territory of Oklahoma, Plaintiff, vs. Mart Perkins, Bert Casey and George Moran, Defendants, indictment.

Commission expires July 24, 1906.

INDICTMENT.

District Court of the Fifth Judicial District sitting in and for the County of Comanche, Territory of Oklahoma,

Begun and Held at Lawton, in said County and Territory, on the 24th Day of February, in the Year of Our Lord One Thousand Nine Hundred and Two.

The Grand Jurors of the Territory of Oklahoma ,within and for said county, having been duly summoned, empanelled, sworn and charged to inquire into and a true presentment make of all public offenses against the laws of the Territory of Oklahoma, committed and triable within said county, upon their oaths aforesaid, in the name and by the authority of the Territory of Oklahoma, do find and present:

That on the 4th day of August in the Year of our Lord One Thousand Nine Hundred and One, at and within said County and within the jurisdiction of said county, Mart Perkins, Bert Casey and George Moran, then and there being did then and there unlawfully, wilfully and feloniously, premeditatedly, of their malice aforethought, and from deliberate and premeditated design to effect the death of Joseph Phillip Beemblossom, did make an assault upon the said Joseph Phillip Beemblossom, and the said Mart Perkins a certain revolver

then and there charged with gunpower and leaden bullets, which he, the said Mart Perkins in his hands then and there had and held, at and against the said Joseph Phillip Beemblossom then and there unlawfully, wilfully, feloniously, premeditatedly and of his malice aforethought, and from a deliberate and premeditated design to effect the death of Joseph Phillip Beemblossom, did shoot off and discharge, and that the said Mart Perkins with the leaden bullets aforesaid, by means of shooting off and discharging the revolver so loaded to, at and against the said Joseph Phillip Beemblossom, then and there unlawfully, wilfully, feloniously premeditatedly and of his malice aforethought,, and from a deliberate and premeditated design to effect the death of the said Joseph Phillip Beemblossom, strike, penetrate and wound the said Joseph Phillip Beemblossom, in and upon the body of him, the said Joseph Phillip Beemblossom, with the bullets aforesaid, by means of the Shooting off and discharging of the revolver so loaded, to, at and against the said Joseph Phillip Beemblossom, and by such striking and penetrating and wounding certain mortal wounds in and upon the body of him, the said Joseph Phillip Beemblossom of which mortal wounds the said Joseph Phillip Beemblossom did then and there instantly die; and that the said George Moran and Bert Casey then and there unlawfully, wilfully, feloniously, premeditatedly, and of their malice aforethought, and from deliberate and premeditated design to effect the death of said Joseph Phillip Beemblossom, were present, aiding, abetting, comforting, procuring assistance and maintaining the said Mart Perkins in the felony and murder aforesaid in manner and from to do and commit.

And so the Grand Jurors aforesaid, upon their oaths aforesaid, do say that the said Mart Perkins, Bert Casey and George Moran, him the said Joseph Phillip Beemblossom, in the manner and by the means aforesaid, feloniously, wilfully, of their malice aforthought and from a deliberate and premeditated design to effect the death of the said Joseph Phillip Beemblossom, did kill and murder, contrary to the form of the stat-

ute in such cases made and provided and against the peace and dignity of the Territory of Oklahoma.

WALTER C. STEVENS,
County Attorney.

Endorsed on back: No. 7. District Court of Comanche County, Oklahoma Territory, February Term, A. D. 1902. Territory of Oklahoma vs. Mart Perkins, Bert Casey and George Moran. Indictment. A true bill. Bert Howard, foreman.

JUDGMENT AND SENTENCE

Territory of Oklahoma, Plaintiff vs. George Moran, Defendant.

Now, at this time, to-wit: April 22nd, A. D., 1903, the same being one of the regular judicial days of the April Term, A. D., 1903, of said Court, the said defendant in the above-entitled cause, George Moran, appears and is present before the bar of said court and by his counsel, Cruce & Cruce, and the said defendant having heretofore been indicted for the offense of murder, and having heretofore plead not guilty of the offense charged in said indictment, and having heretofore been tried by a lawful jury, and by said jury found guilty of the offense of murder, as charged in said indictment, and having heretofore filed a motion for a new trial in said cause, and the same having been overruled, and having filed a motion in arrest of judgment in said cause, and the same having been overruled, by said Court, and the Court having heretofore appointed this time for pronouncing judgment and sentence of said court in said cause, the said defendant is now informed by the Court of the nature of the indictment, and plea and the verdict of said jury in said cause, and is asked by the Court whether he has any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being alleged by said defendant, or appearing to the Court why judgment should not be pronounced; thereupon it is now ordered, considered, sentenced and adjudged by the Court that said defendant, George Moran, is guilty of the offense of murder, as found by said jury, and as charged in said indictment; and that he for the offense by him committed, be imprisoned in the Territorial prison at Lansing, Kansas and confined therein at hard labor for the term of his natural life. To all of which defendant then and there excepts.

Thereupon the Court notifies the said defendant of his right to an appeal in said Cause to the Supreme Court of the Ter-

ritory, and for good cause shown the Court allows said defendant ninety days in which to make and serve a case-made in said cause for the Supreme Court of said Territory, and ten days to said plaintiff to suggest amendments thereto, said case-made to be settled on five days' notice by either party to the other in writing.

It is further ordered and adjudged that the sheriff of Comanche Couty, Oklahoma, transport the said George Moran to the said Territorial prison at Lansing, Kansas, and deliver him, the said George Moran, to the Warden or keeper of said Territorial prison, and the Warden or keeper of said Territorial prison detain the said George Moran according to the foregoing order, sentence and judgment and that the Clerk of this Court immediately certify under the seal of said Court, and deliver to the sheriff of Comanche County, Oklahoma, a copy of the order, sentence and judgment of the court herein to accompany the body of the said George Moran, and to be left therewith at the said Territorial prison, the said copy to be a warrant and authority for the transportation and imprisonment of the said George Moran as hereinbefore provided.

F. E. GILLETTE, Judge.

Territory of Oklahoma Comache County, ss:

I, N. E. Sisson, Clerk of the District Court in and for Comanche County, Oklahoma, hereby certify the foregoing to be a true, complete and correct copy of order of committment in case No. 7, entitled Territory of Oklahoma vs. George Moran, as the same appears on file and of record, in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 6th day of November, 1905.

N. E. SISSON, Clerk.

(SEAL).

Guthrie, Oklahoma, May 3, 1906.

Territory of Oklahoma, Secretary's office.

I do Hereby Certify that the typewritten instrument hereto attached is a true and correct copy of a contract made and entered into by and between E. B. Jewett, Warden of the Kansas State Penitentiary, Mark Tulley, C. L. King, W. H. Haskell, Directors of the Kansas State Penitentiary, and T. B. Ferguson, Governor of the Territory of Oklahoma, and approved on January 31st, 1905, by E. W. Hoch, Governor of the State of Kansas, and filed in this office on the 15th day of April, A. D. 1905, and recorded in Executive Record No. 2, pages 12 and 13.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the Territory the date first above written.

CHAS. H. FILSON
Secretary of Oklahoma Territory.

(SEAL.)

CONTRACT.

THIS AGREEMENT, Made and entered into this 31st day of January, A. D. 1905, by and between E. B. Jewett, Warden of the Kansas Penitentiary, and Mark Tulley, W. H. Haskell and C. L. King, Directors of the Kansas State Penitentiary, by and with the approval of E. W. Hoch, Governor of the State of Kansas and on behalf of the State of Kansas, as Party of the First Part; and T. B. FERGUSON, Governor of the Territory of Oklahoma, by and on behalf of said Territory of Oklahoma, as Party of the Second Part:

WITNESSETH: That whereas the said party of the second part desires to contract with the said parties of the first part as the duly authorized and legal authorities on behalf of the State of Kansas for the keeping, maintenance and confinement of persons convicted of crime in the courts of Oklahoma Territory, and

WHEREAS, the said party of the second part, as Governor of the Territory of Oklahoma, is duly authorized by law to enter into a contract with the authorities of some other state for the care, maintenance and confinement of the convicts of the Territory of Oklahoma, and

WHEREAS, Said parties of the first part are duly authorized to act by and on behalf of the State of Kansas for the purpose of making and entering into a contract with said party for the keeping, maintenance and confinement of the convicts of the Territory of Oklahoma,

NOW THEREFORE, It is hereby agreed that the said warden of the Kansas State Penitentiary, being duly authorized therefor, is to receive and keep in the Kansas State Penitentiary at Lansing, Kansas, all of the persons convicted of crime in said Territory of Oklahoma, whose sentence under the laws of the Territory of Oklahoma is confinement in a penitentiary for one year or more and who shall be ordered by the authorities of said Territory of Oklahoma to be confined in said

Kansas Penitentiary pursuant to conviction and sentence as aforesaid.

The said persons so convicted, sentenced and received by said warden of the Kansas Penitentiary are to be by said warden provided with food, clothing, bedding, medical treatment and guarded while confined at work, being treated in every way as are the prisoners of the State of Kansas, for the sum of forty cents per day for each calendar day for each convict and continuing until the date of discharge of such convicts, by expiration of sentence or other authority of law.

All persons so convicted and sentenced to confinement in said prison are to be delivered to the Warden of said penitentiary by the authorities of the Territory of Oklahoma without expense to said party of the first part.

The warden of said Kansas penitentiary agrees to furnish each prisoner on discharge with a suit of citizens' clothing of the value of $15 and $5 in money, which said amount shall be paid to said Warden by the Territory of Oklahoma on vouchers duly made and approved.

That whenever an Oklahoma convict confined in said Kansas Penitentiary shall be adjudged insane by the authorities of the State of Kansas, as provided by law for Kansas convicts, he or she shall be returned to the sheriff of the County in Oklahoma in which said convict was sentenced or from which said convict was brought to the said Kansas Penitentiary and the sheriff of said county shall receipt to the Warden for the delivery of said prisoner. The expense incurred for such inquisition and for his or her return to Oklahoma Territory shall be borne by the Territory of Oklahoma and such prisoner so adjudged to be insane shall not be eligible for returning to the Kansas State Penitentiary unless in the opinion of the prison physician he or she is in a suitable mental condition to be returned to said Kansas penitentiary. And in case such prisoner is returned to such prison, he or she shall be kept in said prison under the original terms of this contract.

No convict shall be received under this contract into the Kansas Penitentiary who shall be less than sixteen years of age.

All accounts becoming due under this contract shall be paid within thirty days after the close of each quarter or as soon thereafter as the taxes for such purposes can be collected by the treasurer of the Territory of Oklahoma during the continuance of this contract, upon vouchers for such accounts being duly approved and filed with the auditor of the Territory of Oklahoma for allowance and payment.

THIS CONTRACT to continue and be in full force and effect from the date hereof until the 31st day of January, 1907

It is hereby expressly provided, however, that this contract may be terminated by either party giving sixty days notice in writing to the other party.

IN WITNESS WHEREOF, We have hereunto set our hands the day and year first above written.

This contract in duplicate.

E. B. JEWETT
Warden of the Kansas State Penitentiary.

MARK TULLEY
C. L. KING
W. H. HASKELL
Directors of the Kansas State Penitentiary.

T. B. FERGUSON
Governor of Oklahoma Territory.

The above and foregoing contract is hereby approved by me this 31st day of January, 1905.

E. W. HOCH,
Governor of the State of Kansas

FILE COPY.

SUPREME COURT

OF THE

UNITED STATES

Office Supreme Court U. S.
FILED
OCT 12 1906
JAMES H. McKENNEY,
Clerk

NUMBER 8, ORIGINAL

Ex-Parte:

In the matter of

GEORGE MORAN,

Petitioner.

BRIEF OF RESPONDENT

W. O. CROMWELL,
Attorney General, Okla. Ter.

DON. C. SMITH,
Assistant for Respondent.

THE STATE CAPITAL CO., GUTHRIE, OKLAHOMA.

SUPREME COURT

OF THE

UNITED STATES

NUMBER 8, ORIGINAL

Ex-Parte:

In the matter of

GEORGE MORAN,

Petitioner.

BRIEF OF RESPONDENT

This being an original petition for a writ of habeas corpus propriety perhaps will admit of a short discussion of the facts as disclosed by the petition for the writ and the return to the rule granting the writ. The crime committed in this case was committed on August 4th, 1901, at a point within the boun-

daries of Comanche County, Oklahoma Territory. This land was ceded to the Government of the United States by the Kiowa, Comanche and Apache Indians and the cession of the same was ratified by the Congress of the United States by an act approved June 6th, 1900 which act approved the agreement entered into with the above named tribes of Indians and David H. Jerome, Alfred N. Wilson and Warren G. Sayre, duly appointed commissioners on the part of the government of the United States, who did on the 6th day of October 1892, conclude an agreement with said Indians which was ratified by the act above mentioned. Volume 31, Statutes at Large of the United States, pages 678, 680 and 681. By an act approved March 3rd 1901, 31st Statutes at Large, page 1093-1094 it was provided, that the lands opened to settlement under previous acts of Congress ratifying the agreements before mentioned, that the President should make a proclamation for the opening of said lands, which act made it the duty of the Secretary of the Interior to divide the lands so ceded and opened to settlement into counties as would for the time being best subserve the interests of the public, and it was proclaimed, by a proclamation by the President of the United States as provided for in such act, which proclamation was issued July 4th, 1901, that the above described certain lands should be opened for settlement on the 6th day of August, 1901, two days after the commission of the offense charged in this case. The proclamation of the President opening the lands was issued July 4th, 1901, and agreeable to the said proclamation and the previous acts of Congress relative to said lands the Secretary of the Interior divided the lands formerly composing said Kiowa, Comanche and Apache Indian Reservation into three counties and reserved a certain defined location for a county seat in each of the three counties into which said Reservation was divided. The county of Comanche was therefore created a county and its county seat fixed by the proclamation of the President ratifying the act of the Secretary of the Interior by said proclamation on July 4th, 1901, one month prior to the commission of the of-

fense charged in this case, and the counties became proper counties of this Territory upon the issuing of said proclamation, for the Indian title to said land had been extinguished by the act approved June 6th, 1900, 31st Statutes at Large, 681; (Bates vs. Clark, 95 U. S. 204-208; Buster vs. Wright, 135 Fed. 952, 68 C. C. A., 510.) Therefore it results that the crime of murder committed on August 4th, 1901 within the Territory formerly comprising the Kiowa, Comanche and Apache Indian Reservation, was a violation of a Territorial Statute, and we submit that the judgment of the Supreme Court of the Territory of Oklahoma in the case of Moran vs. the Territory, 14th, Oklahoma, 544, 78th Pac. 111 was correct, for the reason that where the place of commission of a crime becomes a part of a new or different county or district the court of the county in which the place is situated at the time of the indictment and trial may lawfully take cognizance of and adjudicate the charge of its commission. Counsel for petitioner urge that the case of Sharp vs. the United States, decided June 12th, 1905, by the United States Circuit Court of Appeals for the Eighth Circuit is decisive of the question of the selection of the grand jury which returned the indictment in this case. With this we canot agree, for the same court on March 1st, 1906 refused to review by habeas corpus the question of the selection of grand jurors and the Circuit Court of Appeals for the Eighth Circuit made this ruling upon the application of this petitioner, in the full light of the case of Sharp vs. the United States, supra, which refusal on the part of the United States Circuit Court of Appeals for the Eighth Circuit was made nearly a year after that court decided the Sharp case, and Judge Sanborn, presiding judge of the Court of Appeals for the Eight Circuit presided at the hearing of the Sharp case and concurred in the opinion and he also wrote the opinion denying the writ in the United States Circuit Court of Appeals, March 1st, 1906, so that neither the Circuit Court of Appeals nor ourselves concede that the formation of a grand jury which returned the indictment in this case can be col-

laterally attacked on habeas corpus as is sought to be done in the case at bar.

It is urged that the facts in the return are admitted by the demurrer. It has also been decided by this court in Ex Parte Siebold, Supra that, "Mere error in judgment or proceedings under and by virtue of which a party is imprisoned constitutes no ground for the issue of the writ. Hence, upon a return to a habeas corpus that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause the general rule is that he will be instantly remanded." The return to the writ in this case contains this verified statement: "The said W. H. Haskell admits that as warden of the state penitentiary of Kansas he has now and has had during the term of his office as such warden the said George Moran in his custody, and that the said George Moran has been and now is confined in the State penitentiary at Lansing, Kansas, as a convict, *having been duly convicted* of the crime of murder in the District Court of Comanche County, Oklahoma Territory, and pursuant to said conviction was duly sentenced by said court of Comanche County, Oklahoma Territory, to be confined in the Territorial prison for and during his natural life at hard labor."

If, as counsel for petitioner contend, all the facts set forth in the return are admitted in the demurrer the prisoner should, by reason of the fact that he was duly convicted of murder in the District Court of Comanche County, Oklahoma Territory, be immediately remanded to the custody of your respondent.

This is an original petition for a writ of habeas corpus wherein the petitioner, having been convicted of an offense the punishment for which might be capital under the laws of the Territory of Oklahoma, seeks his release. This court has no appellate jurisdiction in such a case, its power to review on appeal being limited by statute to cases less than capital.

This court can issue prerogative writs only when incident and auxiliary to a jurisdiction already otherwise acquired, because its original jurisdiction may not be enlarged. The Supreme Court is powerless to issue the prerogative writs, except as auxiliaries to the exercise of a jurisdiction already otherwise acquired. It can only issue mandamus in the exercise of original jurisdiction in a few cases "where the state, or other public minister, or ambassador, or consul or vice consul, is a party, since it is only in such cases that it has original jurisdiction at all." Virginia vs. Rives, 100 U. S. 327; Ex Parte Vallandingham 1 Wall. 252. The jurisdiction of the Supreme and District Courts is defined by statute as follows. Section 716 of the Revised Statutes of the United States reads as follows:

"Section 716. The Supreme Court and the Circuit and District Courts shall have power to issue wrts of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of the respective jurisdictions, and agreeable to the usages and principles of law."

Excepting in cases affecting ambassadors, other public ministers and consuls and those in which a state is a party this court can issue the writ of habeas corpus only in aid of its appellate jurisdiction. Ex Parte Siebold, 100 U. S.; Ex Parte Bollman, 4 Cranch, 75; Ex Parte Watkins, 3 Pet. 202; Ex Parte Wells 18 How. 307-328; Ableman vs. Booth 21 How. 506; Ex Parte Yerger 8 Wall 85.

The jurisdiction of this court remains, so far as we have been able to discover, almost as originally conferred by the Judiciary Act of 1779, some slight changes have been made, as for instance by the Act of January 20th, 1897, Chapter 68, Page 492, Volume 29, United States Statutes at Large, entitled "An Act to withdraw from the Supreme Court Jurisdiction of Criminal Cases not capital and confer the same on the Cir-

cuit Court of Appeals."

This court held in ex Parte, Siebold, 100 U. S., 375: "There are other limitations of the jurisdiction, however, arising from the nature and objects of the writ itself, as definned by common law, from which its name and incidents are derived. It cannot be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence. upon a return to a habeas corpus, that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings, unless, perhaps, where the court has cognizance by writ of error or appeal to review the judgment. In such a case, if the error be apparent and the imprisonment unjust the appellate court may, perhaps, in its discretion, give immediate relief on habeas corpus, and thus save the party the delay and expense of a writ of error."

It was held by this court in the case of Folsom vs. United States, 161, U. S. 121, that the Circuit Court of Appeals had no jurisdiction to review the judgments of the Supreme Courts of the Territories, and it was also held in the case of New vs. Oklahoma, 195 U. S., page 252, that this court had no jurisdiction to review the judgment of the Supreme Court of Oklahoma affirming a case in which the punishment might under the laws of Oklahoma be capital. This court having therefore held that neither the United States Circuit Court of Appeals for the Eighth Circuit nor that this court had jurisdiction to review judgments of the Supreme Court of Oklahoma wherein the punishment may be capital, it follows that if the writ of habeas corpus be issued by this court it must be issued in exercise of its original jurisdiction, for this court has decided that neither the United States Circuit Court of Appeals nor this court has any appellate jurisdiction in cases such as the one at bar. The constitutinal grant of original jurisdiction of this court is contained in section 2, Article 3, of the

Constitution of the United States. The second paragraph of the section is as follows:

"In all cases affecting ambassadors, other public ministers and consuls and those in which the state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as Congress may make."

Once more directing attention to Section 716 of the Revised Statutes of the United States, defining the jurisdiction of this court, and submitting and calling attention also to the case of Folsom vs. United States, 100 U. S., Supra; and New vs. Oklahoma, Supra; and this court having held distinctly in those cases that neither the United States Circuit Court of Appeals nor this Court had appellate jurisdiction to review, and certainly under the statute no original jurisdiction is given, and for these reasons we submit that this petition should be dismissed for lack of jurisdiction and your petitioner remanded to the custody of your respondent.

The opening sentence of the opinion in the case of Ex Parte Wilson, 114 U. S., at page 420, sustains all that has been said, in our judgment, with reference to the jurisdiction of this court to issue writ of habeas corpus in this case. It is as follows:

"It is well settled by a series of decisions that this court having no jurisdiction of criminal cases by writ of error or appeal cannot discharge on habeas corpus, a person imprisoned under the sentence of a Circuit or District court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence." (And cases cited.) See also Hans Neilson Petitioner, 131 U. S., pages 184-85.

The next proposition is whether or not the alleged illegality in the manner of summoning and selecting the grand jury which returned the indictment in this case can be raised on habeas corpus. In other words, conceding for the purpose

of the argument only, that the grand jury was not regular, yet is it to such an extent jurisdictional as to render the judgment and sentence of the court void and subject it to collateral attack on habeas corpus. We contend that it is not and that the mater of the legality or illegality of the grand jury which returned the indictment goes only to the *regularity of the proceedings had, not to the jursdiction of the court.* That the jurisdiction of said court appearing both of the subject matter of the offense charged and of the person of the defendant that the judgment is not void and cannot be collaterally attacked. That the application in this case shows that an indictment fair on its face and observing all the formalities required by law was by a grand jury returned into court charging the defendant with the crime of murder. That the defendant being duly apprehended was placed upon his trial and regularly convicted and a valid sentence of the court imposed upon him. The question of determining the legality or illegality of the panel of the grand jury which returned the indictment against the petitioner was one which by law was vested in the trial court and that court having authority and jurisdiction to hear and determine the question of the regularity or irregularity of said grand jury in the exercise of that power decided that it was valid. If, in determining this mater the court reached an erroneous conclusion, certainly that did not divest the court of jurisdiction either of the person of the defendant or the subject matter of the action. At the most it could only be error which was subject to be redressed on appeal to a higher court. The case was duly appealed and the Supreme Court of the Territory of Oklahoma affirmatively added its sanction to the holding of the trial court that this was a valid grand jury so that both the trial and appellate courts of the Territory clothed with jurisdiction to hear, try and determine the question of the legality of the grand jury in question have affirmed that it was legal. Now by any process of reasoning can it be said that the decision of these courts was and is a nullity. We say

no. The petitioner does not occupy the position of a person placed on trial for an offense required under the law to be presented by an indictment where no indictment in fact is returned, or where the defendant is only informed against when the law requires an indictment. There is a clear distinction in my mind between the two classes of cases, for here there was an indictment returned by a grand jury composed of the requisite number of persons possessing the statatory qualifications of grand jurors under the laws of the Territory selected and summoned in a manner approved by both the trial and Supreme Courts of the Territory, and even if this court should be of the opinion that the method of selecting these grand jurors was irregular or unauthorized by law, yet the fact remains that they were a part of the machinery of the court acting at least under color of authority and if not a *de jure* grand jury were at least a *de facto* grand jury and their acts cannot be collaterally attacked nor the jurisdiction of the court divested on habeas corpus. There are many authorities upon this proposition and I will endeavor to cite those which I consider the most in point and of the greatest weight. In the case of Ex Parte Harding, 120 U. S., pages 782 to 784 inclusive, the doctrine is laid down, that objections that a grand jury was *improperly constituted* and that the defendant was denied compulsory process for witnesses, go only to the regularity of the proceedings, not to the jurisdiction of the court. The first paragraph of the syllabus reads in part:

"This court cannot discharge on habeas corpus a person imprisoned under the sentence of a circuit or district court in a criminal case, unless the sentence exceeds the jurisdiction of that court or there is no authority to hold the prisoner under sentence."

Also in the second and third paragraph of the syllabus as follows:

"A territorial court is not deprived of its jurisdiction to try a person indicted for a criminal offense by the fact that an

alien sat on the grand jury that found the indictment under a provision of a territorial statute permitting it.

"The denial of compulsory process to enable a person charged with crime to obtain witnesses at the trial in the court below does not invalidate the judgment."

I quote from the opinion as follows:

"This court has no jurisdiction for the discharge on habeas corpus of a person imprisoned under the sentence of a territorial court in a criminal case, unless the sentence exceeds the jurisdiction of that court or there is no authority to hold him under the sentence. Ex Parte Wilson, 114 U. S. 417 to 420, and the cases there cited. The fact that the law of the territory allowed an alien who had declared his intention to become a citizen of the United States to sit on a grand jury and that an alien did in fact sit on the grand jury that found the indictment against this petitioner, did not deprive the court of its jurisdiction for his trial under the indictment. The objection, if it be one, goes only to the regularity of the proceedings not to the jurisdiction of the court. The same is true of the allegation in the petition that the petitioner was denied his right to have compulsory process for obtaining witnesses in his favor. For such errors or irregularities, if they exist, a judgment is not void, and a writ of habeas corpus gives this court no authority for their correction."

This proposition as to whether or not a de jure grand jury is an essential to the jurisdiction of the court and whether a person convicted on an indictment returned by a grand jury unauthorized by law, but nevertheless exercising the functions of a grand jury has been squarely passed upon by the Supreme Court of Wisconsin in the cases, consolidated, of the State ex rel Dunn vs. Noyes and Elliott, Volume 87, Wisconsin Reports, pages 340 to 348. These proceedings were brought to the Supreme Court of Wisconsin by a writ of certiorari to review the proceedings in habeas corpus had before the judge of the Circuit Court of Milwaukee County, by which the defendants in error had been discharged from imprisonment and in which the Supreme Court reversed the

judgment and orders of the court below. The proposition involved in these cases was this. A grand jury had been summoned and empanelled for the September term of the municipal court of Milwaukee County and when the October term of said court came on, instead of a new grand jury being empanelled for the October term, the grand jury which had acted at the September term was continued over and used as a grand jury for the October term, which was entirely unauthorized by law and this unauthorized grand jury returned the indictments at the October term on which the defendants had been convicted. They commenced the investigation which resulted in the indictment at the September term, but not having concluded the same continued their sittings over and into the October term and until the last day thereof when the said indictments were found and duly returned. On these facts the judge of the Circuit Court discharged the defendants holding that said indictments were void and that the said municipal court had no jurisdiction therefore to issue the writs for the arrest or the commitments for the detention of the defendants. The second syllabus of the opinion of the Supreme Court in this case reads as follows:

"Where the grand jury summoned and empanelled for one term of court holds over into the next term, and at such second term is recognized by the court as a lawful grand jury it is a grand jury de facto and as against collateral proceedings (in this case writs of habeas corpus) the indictments found by it at the second term are valid, and give the court jurisdiction to issue writs of arrest and commitments."

From the opinion of the court I quote further:

"We take it for granted that the learned judge of the court below held that the municipal court had no jurisdiction to issue the writs and commitments on which the defendants were arrested and imprisoned on the ground that the indictments on which they were based were void, and that the indictments were void because not found by a lawful grand jury. The decision of the court below depended then on the

legality of the grand jury that found the indictments. That question is supposed to be before us on this certiorari. But as we understand the law the court below had no right in this collateral proceeding to inquire into the legality of that grand jury and decide it to have been an illegal body without authority to find the indictments; nor has this court the right to so inquire and decide. We are precluded from inquiring and determining whether the body of men that act as a grand jury was a grand jury *de jure* by the barrier the law sets up to protect the acts of that body in the interest of the public and public justice as a grand jury *de facto.*

The *de facto* doctrine which was introduced into the law as a mater of policy and honesty to protect the interests of the public where those interests were involved in the official acts of persons exercising the duties of an officer, has its most salutary application to the acts of a grand jury and of other official instruments of the court which constitute judicial proceedings. *The courts are supposed to select and determine the qualifications of their subordinate official instruments necessary to the administration of justice.* Their acts cannot be questioned without seriously affecting the proceedings of the court and the conclusiveness of their judgments. The grand jury in question was summoned, selected, empanelled and sworn for the September term of the court and held its session and did business during that term. There is no question but that it was a legal grand jury throughout the September term. On the last day of that term this same body adjourned with the court to the first day of the October term and continued its unfinished business. It is contended that this body became functus officio as a grand jury on and after the last day of September term. It was recognized by the court as a lawful grand jury and the court received the indictment found by it and finally discharged it from further service and ordered the payment of its fees, etc. There cannot be a more appropriate application of the de facto doctrine than to such a body as a grand jury de facto while thus holding over and doing business in the October term of the court. This doctrine in its application to public officers and other acts is well understood. Its history, object and uses are exhaustively treated in the leading case of state vs. Carroll, 38 Connecticut, 449."

In People vs. Petrea, 92 N. Y. 128, the indictment for grand larceny was found by a grand jury *drawn* under a *void statute*. In was insisted on behalf of the defendant that the grand jury was not a lawful one or within the requirements of the constitution. On behalf of the people it was contended:

"That it is sufficient to maintain the authority of the grand jury to investigate criminal charges and find indictments valid in their nature, that the body acted under the color of lawful authority."

The following cases are cited to this principle:

People vs. Dolan, 6 Hun. 232.
Dolan vs. People, 6 Hun. 493, 64 N. Y. 485.
Carpenter vs. People, 64 N. Y. 483.
Thompson vs. People, 6 Hun. 135.
People vs. Jewett, 3 Wen. 314.
Cox vs. People, 80 N. Y. 500.
Friery vs. People, 2 Keys, 450.
Ferris vs. People, 31 How. Pr. 145.

The court said:

"The objection to the constitution of the grand jury which found the indictment lies solely in the fact that they were drawn under the provisions of a void statute, etc. In all other respects the proceedings were regular. The jurors were drawn by the proper officer; they were regularly summoned and returned by the sheriff. They were recognized, empanellel and sworn as grand jurors by the court and as grand jurors they found the indictment: and moreover they were good and lawful men and duly qualified to sit as grand jurors. * * * The grand jury, although not selected in pursuance of a valid law was selected under *color* of law and *semblance* of legal authority. * * * An indictment was found by a body drawn, summoned and sworn as a grand jury before a competent court and composed of good and lawful men. The jury which found the indictment was a *de facto* jury selected and organized under the forms of law."

In People vs. Fitzpatrick, 56 How. Pr. 14 the indictment was found under a law *void* because unconstitutional. The above language in the Petrea case was approved by the two judges and the indictment was held good and valid because found by a grand jury de facto.

"The grand jurors are public officers and they are therefore within the common doctrine and their acts should be held valid as those of any other officer de facto."

In People vs. Dolan, 6 Hun. 232 it was not known how or by whom the persons summoned, sworn and acting as grand jurors were drawn. The court said:

"It is sufficient to maintain the authority of the grand jury to investigate criminal charges and find indictments valid in their nature, that the body acted *under color of lawful authority.*"

In the case of In Re Gannon, 69, Cal. 541 the grand jury organized in July, 1885 held over and was not dissolved by the court until March, 1886, notwithstanding a new grand jury had been selected and returned in January, 1886. A witness refused to testify before this old grand jury on the ground that it was not a legal grand jury. He was imprisoned for contempt and was seeking his discharge by habeas corpus. The court said:

"As an organized grand jury it would have been competent to act under color of lawful authority. Having been appointed to office and having taken the oath of office the individual members are officers of the court not only de jure but de facto, and their acts are valid so far as the public rights are concerned although the title under which they perform those acts may be questionable. *The indictment found by a de facto grand jury is as regular as one found by a de jure grand jury.*"

In the case of Ex Parte Haymond, 91 Cal. 545, a witness refused to testify before the grand jury on the ground that it was not a legal grand jury and sought to be discharged from imprisonment on habeas corpus. The court said:

"Without passing upon the question whether the grand jury before whom the petitioner was summoned to appear was empanelled in accordance with the provisions of the law relating to that subject it is sufficient for us to say that such body has certainly a de facto existance."

In Dolan vs. People, 64 N. Y., 485 and in Carpenter vs. People 64 N. Y. 483 the legality of the jury was challenged because illegally drawn by a commission under an unconstitutional statute, and the proceedings were sustained on the grounds of de facto officers.

In State vs. Belville, (Iowa) 56 N. W. 545 it is held that a grand jury composed of an improper number may find a valid indictment.

In Ex Parte Springer, 1, Utah, 114, the indictment was for a capital offense and the court said:

"The fact that the grand jury which found the indictment was illegal will not be considered upon the hearing of habeas corpus as we conceive that we should stand upon the indictment."

In Ex Rel Dunn, supra, the court further said:

"In reason and by analogy a person under indictment seeking his discharge upon habeas corpus has the same right to allege that the judge or clerk of the court is not lawfully judge or clerk as that the grand jury is not a legal grand jury. The several members of the grand jury are officers of the court as we have seen and their acts should be protected by the same principle that they are de facto jurors."

In Re Burke, 76 Wis., 367 it was alleged that there was no office of Judge to be filled by the incumbent, but it was held that the incumbent was judge de facto.

In concluding the opinion in the suit Ex Rel Dunn vs. Noyes, Supra, the Supreme Court of Wis. said:

"It would put an end to judicial proceedings if the legal title and qualifications of all judicial officers could be contested in collateral proceedings at the instance of aggrieved parties. This is a very important question and a new one in

this court. We have cited all the cases at hand and from the high character of the court they ought to be considered not only satisfactory, but sufficient, especially when based upon such cogent and conclusive reasons. We hold, therefore that the indictments found against the defendants are not void but good and valid indictments, so far as this collateral proceeding is concerned because found by a grand jury acting under color of lawful authority and a good and sufficient grand jury de facto. It follows also that the municipal court of Milwaukee had jurisdiction to issue the writs by which the defendants were arrested and the commitments upon which they were imprisoned and therefore the judge of the circuit court had no cognizance of the cases to discharge the defendants."

It seems to me that there is a complete analogy between the case of a de facto judge and a de facto grand jury. In other words the judge is part of the machinery of the court and he is either elected or appointed according to certain definite provisions of law. Likewise the grand jury may be a part of the machinery of the court and is drawn and empanelled according to definite provisions of law. If a judge who has not been legally appointed or elected, or who in fact has no legal title to the office can preside over a court, try one charged with criminal offense and impose a sentence upon him, all of which can be held valid and legal upon the grounds that he is a de facto officer performing the public duty under color of title to office, so it seems to me that there is equal force in the contention that the grand jury, even though summoned in an irregular manner yet consisting of persons possessing the statutory qualifications of grand jurors and performing their part of the functions of the court that their actions as de facto officers are equally invulnerable to collateral attack. The proposition that a de facto judge may lawfully preside in the trial of a criminal case and impose a valid sentence has been settled beyond any controversy in the late case of Ex Parte Ward, 173 U. S., 452 to 456 inclusive. The circumstances of this case were that Ward was tried and

found guilty before Edward R. Meek, Judge of the District Court of the United States for the Northern District of Texas for an offense against the laws of the United States, and was sentenced therefor to the penitentiary at Leavenworth, Kansas. He thereupon made application to the United States Supreme Court for leave to file a petition for habeas corpus on the ground that the sentence was void because Judge Meek was appointed at a time and in a manner not authorized by law. In discussing this matter the Supreme court said:

"It is further contended that the President could not during the recess of the Senate and without its concurrence, invest an appointee with any portion of the judicial power of the United States Government as defined in Article three of the Constitution because that article requires that Judges of the United States Courts hold their offices during good behavior and hence that no person can be appointed to such office for a less period and authorized to exercise any portion of the judicial power of the United States as therein defined.

"We need not, however consider the elaborate argument of counsel in this behalf, since we regard the well settled rule applicable here, that where a court has jurisdiction of an offense and of the accused and the proceedings are otherwise regular, a conviction is lawful although the judge holding the court may be only an officer de facto; and that the validity of the title of such judge to the office and his right to exercise the judicial functions cannot be determined on a writ of habeas corpus.

"In Griffin's case, Chase's Decisions, 364, 425, this was so ruled and Mr. Justice Chase said: 'This subject received the consideration of the judges of the Supreme Court at the last term with reference to this and kindred cases in this district, and I am authorized to say that they universally concur in the opinion that a person convicted by a judge de facto acting under color of office though not de jure, and detained in custody in pursuance of his sentence cannot be properly discharged upon habeas corpus.' ". Citing:

Shehans case, 122 Mass. 445.
Fowler vs. Rebee, 9 Mass. 231, 235.

People vs. Bangs, 24 Ills. 184-187.
In re Burke; In re Manning, 76 Wis. 357, 665.
In re Manning, 139 U. S. 504.
Church on Habeas Corpus Transactions, 256, 257, 259.

In concluding the opinion the Supreme Court said:

"The result of the authorities is that the title of a person acting with color of authority even if he be not a good officer in point of law, cannot be collaterally attacked, and as Judge Meek acted at least under such color we cannot enter upon any discussion of propositions involving his title to the office he held."

In the case of In re Wilson, 140 U. S. 575 to 585 the proposition as to whether or not an infirmity in the panel of the grand jury which returned the indictment gave ground for relief by habeas corpus, was fully discussed, and I extract therefrom the following:

"A deficiency in the number of grand jurors prescribed by law, there being present and acting a greater number than that requisite for the finding of an indictment is not such a defect as vitiates the entire proceedings and compels his discharge on habeas corpus, though unnoticed by the prisoner until after trial and sentence."

After discussing the question of what was required to constitute a valid jury under the Territorial laws of Arizona, the Supreme Court said:

"This presents an interesting question of statutory construction, one into which however, we deem it unnecessary to enter. As it is a question if it had been duly presented to the District Court, a court having jurisdiction over the offense and the prisoner, and by it erroneously decided, can it be that such erroneous decision would have vitiated and rendered void the sentence thereafter rendered? We think not."

Further on in the opinion the court said:

"An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is

not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."

In Ex Parte Siebold, 100 U. S. 275 the court said:

"Hence upon a return to a habeas corpus that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings unless perhaps where the court has cognizance by writ of eror or appeal, to review the judgment."

In Ex Parte Bigelow, 113 U. S. 330-331 the court said:

"It may be confessed that it is not always easy to determine what matters go to the jurisdiction of the court, so as to make its actions when erroneous a nullity. But the general rule is, that when the court has jurisdiction by law of the offense charged and of the party who is so charged its judgments are not nullities. * * * We are of the opinion that what was done by that court was within its jurisdiction. That the question thus raised by the prisoner was one which it was competent to decide, which it was bound to decide, and that its decision was the exercise of jurisdiction."

Ex Parte Watkins, 3 Peter, 193.
Ex Parte Parks, 93 U. S. 18-23.
Ex Parte Yarbough, 110 U. S. 651.
Ex Parte Crouch, 112 U. S. 178.

In Ex Parte Wilson, 114 U. S. 421, the court said:

"It is well settled by a series of decisions that this court having no jurisdiction of criminal cases by writ of error or appeal cannot discharge on habeas corpus, a person imprisoned under the sentence of a circuit or district court in a criminal case, unless the sentence exceeds the jurisdiction of that court or there is no authority to hold him under sentence." (Citing authorities.)

In the case of Miller vs. The People, 183 Illinois, the proposition is affirmatively laid down that an irregularity in the selection o fthe grand jury does not affect the jurisdiction of the court. On page 430 in the opinion the court said:

"A grand jury may be regarded as a part of the machinery to be used in the criminal practice in the courts, but its selection is not a matter affecting the jurisdiction of the court."

The indictment upon which the petitioner was tried and convicted in this case was found at a term of the District Court of Comanche County which was held prior to the occurrence of any general election in said county at which, under the statutory provisions of the Territory, jury lists could have been returned for use by the court, said term of court being held in October, 1901, and the first general election in said county being held in November, 1902. It follows as a necessary result that no jurors could be obtained in Comanche County pursuant to the statutory method until after the general election of 1902, and unless the District Court of Comanche County had the power to issue an open venire for the selection of grand jurors in the mode sanctioned by the common law, it results as a necessary conclusion that a complete barrier was thereby erected to the administration of justice in that county until after the election held nearly a year and a half after the opening of this country to settlement. Upon the proposition of the powers of the District Court of Comanche County to resort to the common law method of obtaining a grand jury I desire to first call attention to that provision of the Organic Act of the Territory of Oklahoma contained in Section 8, thereof which reads as follows:

"And said Supreme and District Courts respectively shall possess chancery as well as common law jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States, or of the Territory, affecting persons or property."

I next direct attention to Section 4200, Volume 2, Wilson's Annotated Statutes of Oklahoma, which reads as follows:

"The common law as modified by constitutional and statutory law, judicial decisions and the conditions and wants of

the people shall remain in force in aid of the general statutes of Oklahoma, etc."

Also to section 5151, same volume which reads as follows:

"The procedure, practice and pleadings in the District Courts of this Territory in criminal actions, or in matters of criminal nature, not specifically provided for in this chapter shall be in accordance with the procedure, practice and pleadings of the common law and assimilated as near as may be with the procedure, practice and pleadings of the United States, or federal side of said court."

The provisions of the Territorial law for obtaining statutory grand and petit juries are contained in Chapter 46, Volume 1, Wilson's Statutes of Oklahoma and I call the attention of this court to the fact that while a complete system is therein provided for the obtaining of grand and petit jurors, and which we will presume was intended by the legislature to be sufficient in all cases, yet there is no provision in said act prohibiting the court from resorting to the common law method in the event that the jury box is exhausted and there is no available method of obtaining qualified jurors. There is a provision in section 3312 of said chapter for summoning sufficient jurors to complete the number required for a jury in a particular case whenever the panel in attendance at the court is exhausted. This applies only to petit juries and to the summoning of talesmen for the particular case. There is no general provision in the Oklahoma statutes providing for the procuring of a statutory grand jury in such an emergency as existed in this case. There is a provision in Section 3313 to the effect that if the list of jurors prepared under the provisions of said act are destroyed or lost that it shall be the duty of the County Clerk to immediately prepare lists as therein provided for and send such lists to each township and city assessor who shall select under oath from the tax payers of his township or city the number of suitable and legal jurors as indicated by the clerk in the notice so sent to

him, and such assessor shall immediately return said list, and the clerk shall again from such lists returned by said assessor prepare the jury list, but it will be observed that this provision presupposes the election of a statutory list of jurors and an emergency where the same have been destroyed or lost, so that there is no existing provision of statutory law for obtaining jurors in the manner indicated under such an emergency as existed in this case. I contend that under these circumstances the District Court of Comanche County, being a court of general original jurisdiction, clothed not only with these powers specially conferred by statute, but with common law jurisdiction by the Organic Law of the Territory bestowed upon it by Act of Congress creating the Territorial Government and having authority for the redress of all wrongs, committed against the constitution or laws of the United States or of the Territory, that as a necessary incident to the exercise of the jurisdiction and powers conferred upon said court it was necessarily clothed with the inherent power to summon for its use those integral elements of the machinery of the court which were necessary for the carrying into effect of the express powers granted to it. It is a fundamental proposition that where there is a general grant of power that by necessary implication there is included in such grants those matters which are incidental and necessary for the carrying into effect of the general powers so delegated. I invite the attention of this court to the case of Clawson vs. United States, 114 U. S. 477 to 488 inclusive, as it will only be possible to quote briefly from said decision in this brief. This was a case in which Clawson was tried and convicted under the laws of the Territory of Utah and by the laws of which Territory a statutory method was prescribed for obtaining grand and petit juries providing that the same should be selected by the Clerk of the District Court and judge of the Probate in the county in which the District Court was to be held to the number of two hundred, which was to constitute a list from which should be selected

grand and petit jurors for the current year. In Clawson's case the statutory methods had been duly observed but the jury box had been exhausted by the drawing therefrom of the entire two hundred names leaving no statutory jury available from which to select the trial jury. Thereupon on the motion of the prosecuting attorney the court issued an open venire to the United States Marshal, commanding him to summon from the body of the judicial district fifty jurors. They were duly summoned and the panel was challenged by the defendant because the jurors were selected and summoned on open venire, and of the jury by which Clawson was tried eleven were obtained from those summoned in the manner indicated. The case went to the Supreme Court of the United States on error, one of the main contentions being that the provisions of the laws of Utah Territory providing a statutory method of selecting juries was exclusive, and that no other method could be pursued, and that if the two hundred names were all drawn out for grand or petit juries at any time during the year, that no more indictments could be found or jury trials had in said court during the remainder of the year. In disposing of this question the Supreme Court of the United States said: (Page 485.)

"A result so disastrous to the administration of justice, so certain to impair if not destroy public and private rights, is not to be permitted, unless imperatively required. The Act of June 23, 1874 does not prescribe the making of a new list by the probate judge and clerk except once a year, in January, or the making by them of an additional list at any time during the year. But that act does not directly or by implication, or intendment exclude the use of an open venire, when the two hundred names are exhausted during the year. It provides that the jurors drawn and summoned shall constitute 'the regular grand and petit juries for the term for all cases.' By other provisions of law each of the District Courts of the Territory is required to hold four terms a year. There is no doubt the jurors must be drawn from the two hundred names or those of them remaining in the box so long as any remain. But the question is, what is to be done when

these names are exhausted? If there is no method that can be resorted to to obtain jurors in such event the provisions in paragraph 5, of the Act of 1882 for challenges of the United States with a view to indictments for the offenses named in that section will have proved suicidal and resulted in destroying all the opportunity to find or try such indictments. We are not referred to any statutory provision in any Act of Congress or any Act of the Territory which forbids the use of an open venire, when the two hundred names are exhausted. The argument is that the provisions of paragraph 5, in the Act 1882 covers the entire subject of obtaining jurors and do not allow of any supplementary measures; and that such measures cannot be resorted to unless affirmative statutory authority directed to the very point is to be found. The Supreme Court of Utah in its opinion affirming the judgment in the present case did not refer to any statute of Congress or of the Territory directly authorizing the open venire but rested the power to issue it on the fact that such power was inherent in the court and was not forbidden by any statute in force in Utah; and held that it followed as an incident to the authority and duty of the District Court to hold its sessions and try by jury, indictments for crimes. We concur in this view so far as the resort to the open venire after the exhaustion of the two hundred names, is concerned.

"Section 4, of the Act of 1874 prescribed the rule to be observed to the extent in which it prescribed any rule. It proceeds on the view that the jury list of two hundred names will be sufficient for ordinary purposes, or, as it expresses it: 'The regular grand and petit juries for the term;' and it provides what shall be done so long as there are no names left in the box. But it is silent as to what shall take place when the name are all exhausted. *It does not forbid the ordinary and well known resort to an open venire.* * * *

"The principle which authorized the action of the court in obtaining petit jurors in this case, after the statutory measures had been exhausted, is sanctioned by authority." (Citing.)

A B. Juris, C; 1st Chitt. Crim. Law. 518.

2 Hale P. C. 265, 266.

U. S. vs. Hill, 1 Brock, 156.
Mackey vs. The People, 2 Colo. 13.
Stone vs. The People, 2 Scammon, 326.
Straughan vs. The State, 16 Ark. 37-43.
Wilburn vs. The State, 21 Ark. 198, 201.
Gibson vs. The Commonwealth, 2 Virg. cases, 111, 121.
Shafer vs. The State, 1 How. (Miss.) 238, 241.
Woodside vs. The State, 2 How. (Miss.) 655, 659.
S[illegible] vs. Harris, (Iowa.)

By paragraph 1868, Revised Statutes, District Courts of the Territory have common law jurisdiction and in paragraph 1874 and 1061 of the Compiled Laws of Utah of 1876 those courts have original jurisdiction in criminal cases, etc. * * * * The venire to summon jurors is a writ necessary to the exercise of the jurisdiction of the court and agreeable to the principles and usages of law, where it is not forbidden or excluded and where the affirmative provisions of law have so far as they extend, been first observed. In U. S. vs. Hill (before cited,) Chief Justice Marshall, speaking of the law as it then existed, says: "It has been justly observed that no act of Congress directs grand juries or defines their power. By what authority, then, are they summond, and whence do they derive their powers? The answer is that the laws of the United States have erected courts which are invested with criminal jurisdiction. This jourisdiction they are bound to observe and it can only be exercised through the instrumentality of grand juries. *They are, therefore, given by a necessary and indispensable implication. But how far is this implication necessary and indispensable? The answer is obvious. Its necessity is co-extensive with that jurisdiction to which it is essential.*"

In my judgment, there is a complete analogy between the Clawson case and the one at bar. What distinction can possibly be drawn between a case where the names of all

the statutory grand jurors have been drawn out of the box and the list exhausted, and no further recourse possible to statutory methods until the commencement of another year, when a new list may be drawn, and a case like this one where the jury box is empty and there are no names of statutory jurors in it, because of the fact that the county was created after the election at which statutory jurors could be returned and the term of court was held in the interim prior to the next general election, which would be the first opportunity to obtain statutory lists of grand jurors? It seems to me that a mere statement of the fact carries with it the answer that there is no distinction. In either instance the statutory method is unavailing. In one case the statutory method has been exhausted, and in the other case, it is impossible to obtain a statutory list for lack of the opportunity and machinery with which to do so. It is in just such an emergency as this that the court has the right to invoke its inherent common law powers and issue an open venire for the purpose of procuring the necessary jurors with which to perform duties expressly vested in the court by law. Upon the argument of this case, in the United States Circuit Court of Appeals, the question was propounded by the court and we were asked to refer to the same in our brief, as to whether the common law jury could be sumoned by a court without legislative authority.

First, in answer to this question I submit that by the citations from the Organic Act and acts of the Territorial Legislature heretofore given that express legislative authority is conferred upon the courts to invoke the common law method of selecting a jury whenever the statutory method has been exhausted or is impossible. Certain it is that the District Courts of the Territory are vested with common law jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property, and under the law a district court is required to be held in each county in the Territory at such time and place as may be prescribed

by law. Then again the common law as modified by constitutional and statutory law, judicial decisions and the conditions and wants of the people, is to remain in force in aid of the general statutes of Oklahoma. And again by legislative act the procedure, practice and pleadings in the district courts of the Territory in criminal actions or in matters of a criminal nature not specifically provided for in the chapter on criminal procedure, shall be in accordance with the procedure, practice and pleadings of the common law. Now what could be more plain than the intent of the legislature that whenever there should be a failure or omission in the statutory law to meet any of the conditions and wants of the people or any matter not provided for by the code of criminal procedure, that resort should be had to the common law? It is manifest that such a view is one that is conducive to the welfare of the people and the administration of justice, and I think that such is the plain intendment of the various acts cited. In preparing to brief this case, I have examined the authorities relative to the early procedure under the English common law as to the powers of the courts and the methods of obtaining grand juries. At the common law a grand jury consisted of not less than twelve and not more than twenty-three jurors, and a concurrence of at least twelve was necessary in order to return a true bill. In Thompson and Merriam on Juries, Chapter 22, in speaking of the early history of the accusing body it is said, that an accusing body but not a grand jury so called, has certainly been known to the law since the time of Henry III.,How much earlier it existed may be a matter of conjecture. Bracton's account, as stated by Mr. Reaves in his authoritative history of the English law is quite intelligible. A general summons preceded the coming of the justices itinerant into a county, commanding all persons to appear at a certain time and place. After the people had duly assembled, an address was issued to the gathering explaining the cause of their coming and the command of their king that by authority of their allegi-

ance, they should lend their advice and assistance to the repression of crime. Then followed the procedure by which twelve men were selected as an accusing body for each hundred. No witnesses were examined and the presentments were made upon the knowledge of the jurors in respect to any such violations of law as were the subject of their inquiry, etc. This seems to have been the earliest history of an accusing body and which subsequently gave rise to the common law grand jury as we now understand it. The text above stated:

"How long inquests were taken as indicated in the foregoing cannot be definitely stated. The earliest instance of an innovation looking to the establishment of a grand jury taken from the county at large occurs in the forty-second year of Edward III, where at the commission of oyer and terminer, besides the return of an inquest for every hundred by the bailiff, the sheriff likewise returned a panel of knights, which, says the old record, were le graunde inquest. The speculations of Mr. Reaves upon the functions of the inquest after the appearance of this new body are substantially adopted by a later and eminent authority and are given at length, showing the final and complete establishment of the institution of the grand jury. * * * * When the practice began of returning a grand inquest to inquire for the whole body of the county, the business of the hundred inquest must naturally decline, till at length the whole burden of presenting and finding indictments devolved upon the grand inquest and the hundredors continued to be summoned merely for trying issues."

Coming down to the institution of a grand jury as it was finally perfected and known to the common law, the text above stated on page 572:

"At common law the sheriff had the same unqualified power of selection in the case of grand as well as petit jurors. Upon the summons of any session of the peace, and in cases of commissions of oyer and terminer and jail delivery, there issued a precept, either in the name of the king, or of two or more justices, directed to the sheriff, upon which he returned twenty-four or more out of the whole county, a certain num-

ber being for each hundred, from which panel the grand jury was organized, etc."

In Volume 2, Cooley's Blackstone, page 301, paragraph 2, chapter 23, we find the law stated as follows:

"An indictment is a written accusation of one or more persons of a crime or misdemeanor preferred to and presented upon oath by a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of oyer and terminer and of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, aid, and execute all those things which on the part of our lord, the king, shall then and there command them. They ought to be freeholders, but to what amount is uncertain, which seems to be casus omissus and as proper to be supplied by the legislature, as the qualifications of the petit jury which were formerly equally vague and uncertain, but are now settled by several acts of parliament. However, they are usually gentlemen of the best figure in the county. As many as appear on this panel are sworn upon the grand jury to the amount of twelve at least and not more than twenty-three, that twelve may be a majority. Which number as well as constitution itself we find exactly described so early as the laws of King Ethelred. In the time of King Richard the Third, the process of electing the grand jury ordained by that Prince was as follows: Four knights were to be taken from the county at large, who chose two more names out of every hundred, which two associated to themselves ten other principal free men, and these twelve were to answer concerning all particulars relating to their own district. This number was probably found too large and inconvenient; but the traces of this institution still remained in that some of the jury must be summoned from every hundred. Thus grand juries are previously instructed in the articles of their inquiry by a charge from the judge who presides upon the bench, etc."

From whatever source the authority of the court to order a grand jury at common law may have been originally derived, it is apparent that the practice as finally adopted was

to issue an open venire to the sheriff who was to select the requisite number from the body of the county and return them into court, out of which panel the grand jury was selected by the court. In this condition the common law came to this country, and has been by express legislation put into force and effect in this Territory except where superseded by statutory enactments, and whatever the original source of power may have been, yet as the common law came to this Territory, it seems to me that the courts were invested by long usage with the inherent power to summon a grand jury in the manner indicated, and if the court had this power, then the District Court of Comanche County properly exercised the power and the grand jury in question was a valid common law grand jury. No question can be raised as to the method of obtaining the grand jury, because the Supreme Court of the United States in the Clawson case has lent its sanction to the method employed where after citing the proceedings had and the decision of the Supreme Court of Utah relative thereto, it was said:

"We concur in this view so far as the resort to the open venire, after the exhaustion of the two hundred names, is concerned."

The query was also propounded in the United States Circuit Court of Apleals at the oral argument, whether in a case like this where a common law indictment was returned, but where before a trial a statutory grand jury had been in session, that circumstances affected the validity of this trial had on the common law indictment.

In reply, will say that I believe that it has no effect whatever. Either the common law indictment was authorized or it was not. If it was authorized the subsequent empanelling of a grand jury would not vitiate it. Even if the common law grand jury was unauthorized, it was still a de facto grand jury, and the judgment of the court is not void and

is consequently invulnerable to collateral attack of habeas corpus.

We do not believe that this court will permit a writ of habeas corpus to be substituted in this case for a writ of error or appeal. We do not believe, in the light of the entire case, that any of the constitutional rights of the petitioner have been invaded in any manner ,and it is hard indeed to believe that any constitutional right of this petitioner could possibly have been overlooked by the able counsel for the petitioner up to and including this time, and do not believe that the various courts through which this case has passed have each been guilty of committing or perpetuating the same error. On the contrary the entire record and all law upon this subject being taken into consideration we think there is one thing and one thing only for this court to do and that is to remand the petitioner to the custody of the respondent in this case with directions to the respondent to confine the petitioner at Lansing, Kansas as he is now confined in accordance with the sentence and judgment originally pronounced upon him in the District Court of Comanche County, Oklahoma Territory.

Respectfully submitted,

W. O. CROMWELL,
Attorney General, Oklahoma Territory.

DON C. SMITH,
Assistant.
For Respondent.

Supreme Court of the United States.

No. 8, Original.—October Term, 1906.

In the Matter of George Moran, Petitioner.

[November 5, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a petition for a writ of habeas corpus and a writ of certiorari, brought by a person imprisoned on a conviction for murder, alleging that the judgment under which he is held is void. A rule to show cause was issued and the case was heard on the petition and answer. The various grounds upon which the petition is supported are alleged to go to the jurisdiction of the trial court. *Ex parte Harding*, 120 U. S. 782. See *New* v. *Oklahoma*, 195 U. S. 252. A writ of habeas corpus for the same causes was heard by the Circuit Court of Appeals and discharged. *Ex parte Moran*, 144 Fed. R. 594. The judgment also was affirmed by the Supreme Court of the Territory in which the petitioner was tried. *Moran* v. *Territory*, 14 Okl. 544. 78 Pac. R. 111.

The petitioner was tried in the District Court for Comanche County in the Territory of Oklahoma. The first ground now relied upon is that the Court was not duly organized under the Act of Congress requiring the Supreme Court to define the judicial districts, and to fix the times and places at each county seat where the District Court shall be held. The order of the Supreme Court went no further in the way of fixing the place than to specify Lawton for the county of Comanche. This order was made on January 15, 1902, about six months after the land, which had been Indian territory, was opened for settlement and the county created. At that time and at the time of the trial there were no county or court buildings in the county. The order of the Supreme Court was as precise as the circumstances permitted it to be, and the failure to specify a building did not go the jurisdiction of the trial court. There is no pretence that the petitioner lost any opportunities by reason of no building being named.

The next ground argued is that the laws of the Territory were not followed in the selection of the grand jury, because the persons selected were not electors of the Territory and some of them were nonresidents, with other subordinate matters. The order for the summons stated the reason, which was that there had been no election held in the county, and there were no names of jurors in the jury box; whereupon the presiding

judge ordered the sheriff to summon twenty persons from the body of the county. We have heard no answer to the material portion of the reasoning of the Circuit Court of Appeals upon this point. If the legislature of Oklahoma had prescribed the method of selection followed, that method would not have violated the Constitution or any law or treaty of the United States. If it did prescribe a different one, a departure from that was a violation of the territorial enactment alone. The acts of the Legislature of Oklahoma are not laws of the United States within the meaning of Rev. Sts. § 753. If any laws have been violated it is the latter one. Therefore the petitioner is not entitled to release on this ground under Rev. Sts. § 753. The Fifth Amendment, requiring the presentment or indictment of a grand jury, does not take up unto itself the local law as to how the grand jury should be made up, and raise the latter to a constitutional requirement. See *Rawlins* v. *Georgia*, 201 U. S. 638. It is unnecessary to consider whether the judge went beyond his powers under the circumstances. See *Clawson* v. *United States*, 114 U. S. 477. But it is proper to add that while the reason which we have given is logically the first to be considered by this Court, we do not mean to give any countenance to the notion that if the law was disobeyed it affected the jurisdiction of the Court. *Ex parte Harding*, 120 U. S. 782. *Ex parte Wilson*, 140 U. S. 575.

The third ground on which the jurisdiction of the trial court is denied is, that, on August 4, 1901, the date of the commission of the crime, the place was within territory not embraced in any organized county, and was attached for judicial purposes to Canadian County. By the Oklahoma Organic Act, May 2, 1890, c. 182, § 9, (26 Stat. 85, 86,) this is provided for, and by § 10 such offences shall be tried in the county to which the territory 'shall be attached.' It is argued that there had been no law passed changing the place of trial or affecting the order of the Supreme Court attaching the territory to Canadian County. But the very words quoted from § 10 look to the state of things at the time of trial. At that time Comanche County had been organized, and a term of court fixed for it by the order of the Supreme Court dated January 15, 1902. The meaning of this order, so far as the power of the Supreme Court went, is plain. The statute gave the petitioner no vested right to be tried in Canadian County, and his trial in Comanche County conformed to its intent. See *Post* v. *United States*, 161 U. S. 583.

The fourth ground is, that, as the crime was committed on August 4, 1901, two days before the opening of the land for settlement, the place was still under the exclusive jurisdiction of the United States, and therefore the crime was punishable under Rev. Stat. § 5339 alone. The order of the President with regard to the conditions of settlement and entry are referred to as confirming the argument. But those orders were intended

merely to carry out the acts of Congress governing the matter. There is no doubt that Congress was exercising control so far as settlement was concerned. But there is equally little doubt that the title to the territory had passed, that it had become part of the Territory of Oklahoma, and, as such, no longer under the exclusive jurisdiction of the United States within Rev. Stats. § 5339. Act of May 2, 1890, c. 182, §§ 1, 4, 6, 26 Stat. 81; Act of June 6, 1900, c. 813, 31 Stat. 677; Act of March 3, 1901, c. 846, 31 Stat. 1093. See *Bates* v. *Clark*, 95 U. S. 204. *Buster* v. *Wright*, 135 Fed. R. 947, 952. *Ex parte Moran*, 144 Fed. R. 594, 602. Therefore the application of the territorial statute was not excluded and the murder was a violation of the territorial law.

Finally it is contended that the petitioner was compelled to be a witness against himself, contrary to the Fifth Amendment, because he was compelled to stand up and walk before the jury, and because, during a recess, the jury was stationed so as to observe his size and walk. If this was an error, as to which we express no opinion, it did not go to the jurisdiction of the Court. *Felts* v. *Murphy*, 201 U. S. 123.

Rule discharged. Writs denied.

True copy.

Test:

Clerk Supreme Court, U. S.